The ANTITRUST BULLETIN

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INTRODUCTION

IT IS TRADITIONAL for the first issue of a magazine to carry a declaration of purpose. Some publishers take it as an opportunity to detail the life and hard times of their enterprises; some to expound on what is wrong with the world in general and the field they will cover in particular, even if they aim to do no more than provide instructions and suggestions to hyena breeders. Our declaration, we hope, is simple and direct. Our purpose is to present an objective record of antitrust law, practice and developments. In convenient reference form we expect to present what is new and important in the antitrust field. The ANTITRUST BULLETIN will appear monthly, except for July and August. Among the more prominent features will be reprints of the better law review articles; at least one original paper in each issue; summary coverage of legislation, administrative rulings, court decisions and consent decrees; a bibliography of current antitrust literature; book reviews; advance notice of professional meetings and activities; and comment on economic and industrial developments. We trust the ANTITRUST BULLETIN will be useful to attorneys, economists and industrialists. As the magazine progresses we expect to add new departments and in that respect, we shall look to our readers for suggestions that will permit us to provide better and more complete coverage and service.

HIGHLIGHTS OF THE FINAL REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS[1]

by

S. CHESTERFIELD OPPENHEIM, *Co-chairman*
Professor of Law
University of Michigan

UNANIMOUS ADHERENCE TO ANTITRUST FUNDAMENTALS

PERHAPS THE MOST notable feature of the Report is the Committee's unanimous affirmation of the basic principles of antitrust policy. At the outset, the Report states: "The Committee unanimously adheres to antitrust fundamentals with full vigor. Although many forces and other Government policies have materially promoted our creative American economy, we believe the antitrust laws remain one of the most important."[2] As a corollary, the Report asserts that "a backward look across the 64 years since the Sherman Act reveals on the whole a healthy process of growth through which antitrust fundamentals have gained in strength and effectiveness."[3] In a later chap-

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[1] This is intended only as a summary of the basic analysis, conclusions and recommendations in the Report. Except for my personal comments at the end of this paper, this presentation adheres closely to the words of the Report since I do not presume to act as the single interpreter of those words in behalf of the some sixty members of the Committee.

In this summary I have followed the sequence of the chapters and topics within chapters as set forth in the Report. The chapter contents are as follows: I. A Policy Against "Undue Limitations on Competitive Conditions"—Sections 1 and 2 of the Sherman Act Generally; II. "Trade or Commerce * * * With Foreign Nations"; III. Mergers; IV. Antitrust Policy in Distribution (principally under Sections 2 and 3 of the Clayton Act); V. Patent-Antitrust Problems; VI. Exemptions From Antitrust Coverage; VII. Economic Indicia of Competition and Monopoly; VIII. Antitrust Administration and Enforcement.

These chapter headings are repeated in this summary. All quotations in the text, unless otherwise indicated, are from the Report. Page references to the Report are cited in the footnotes only where there is a deviation from the order of the Report's treatment or where the citation appeared to be especially needed. Otherwise it is assumed that the interested reader has ready access to the Report copies which are available for purchase from the Superintendent of Documents, United States Government Printing Office, Washington 25, D.C. at $1 per copy. Citations to cases are given only when the case is mentioned in the text of this summary.

[2] Report 2.

[3] Report 3.

ter, the Committee again proclaims in unequivocal terms that "the basic philosophy of the Sherman Act today remains above partisan controversy as a 'charter of freedom,' a constitution governing the economy of the United States." [4]

I. A POLICY AGAINST "UNDUE LIMITATIONS ON COMPETITIVE CONDITIONS"

Rule of Reason semantics clarified. One controversial issue has been an asserted conflict between the Rule of Reason and the so-called *per se* violations. The Report seeks to remove semantic barriers to a proper understanding of the role of "unreasonable *per se*" violations within the over-all Rule of Reason. To this end, the Report indorses the rationale of the Supreme Court's opinions in the *Standard Oil* case of 1911.[5] Guided by the Court's pronouncement of the dominant Sherman Act policy against "undue limitations on competitive conditions," the Report explains that "the Rule of Reason as the general rule of construction in all Sherman Act cases requires interpreting the Act in the light of a broad public policy favoring competition and condemning monopoly."

This judicial discretion is "confined to consideration of whether in each case the conduct being reviewed under the Act constitutes an undue restraint of competitive conditions, or a monopolization, or an attempt to monopolize." The Rule of Reason "permits the courts to decide whether conduct is significantly and unreasonably anticompetitive in character or effect." This recognizes that "certain forms of conduct, such as agreements among competitors to fix market price or control production, are 'conclusively presumed to be illegal, by reason of their nature or their necessary effect,' so that they can quickly and positively be adjudged violations of the Sherman Act." [6] Group boycotts are also placed in this category. Inquiry under the Rule of Reason is ended once it is found that in fact these forms of conduct exist. For then "the effect on competition is known to be so adverse that the conduct is unreasonable *per se*."

Conversely, "Practices which are not unreasonable *per se* are those from which a fixed set of effects do not necessarily follow.

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[4] Report 132.

[5] *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 52 (1911).

[6] Report 11.

They are subject to more extensive market inquiry under the standards of the antitrust laws." Their "actual or probable market consequences must be determined as a part of the test of their legality. Such determination, in turn, involves resort to economic analysis."

In these broad strokes, the Committee accepts the Rule of Reason as the general rule of construction in Sections 1 and 2 Sherman Act cases without repudiating the unreasonable *per se* offenses within the contours of this overall standard. At the same time, the Report subscribes to this "essential standard of reasonableness" as consonant with the need for general standards of antitrust prohibition adaptable to the dynamic competitive process. Thus, no amendment is proposed to the substantive standards of the Sherman Act.

Section 1 of the Sherman Act Generally

With respect to Sherman Act, Section 1, a variety of devices may require varying degrees of inquiry. The Report points out that two difficult questions arise. "First, does defendant's conduct constitute price fixing in purpose or effect?" In the case of outright market price fixing by agreement among competitors, as in *Trenton Potteries,*[7] "the answer is easy." But the Report notes that "Often, however, where the character or effect of the conduct is equivocal, a broader view of the way the market functions is required before a court can decide whether given behavior in fact amounts to price fixing." Second, "where price fixing is not found, but the practices reviewed may affect price formation," then "reasonableness or unreasonableness turns on the relative significance of the competition eliminated as compared with their other purposes or effects." Then the court's task is "to determine (1) whether the defendants have enough market power to make the restriction on price competition an 'undue restraint' and (2) whether they currently exercise the power or intend to do so."[8]

Regarding *market division by agreement among competitors,* the Report concludes that "While in no Supreme Court case have the facts been limited exclusively to simple market division among competitors, there is little doubt, either as a matter of principle or of

[7] *United States v. Trenton Potteries Co.,* 273 U. S. 392 (1927).

[8] Report 14.

precedent, that agreements among competitors for market division should be and are treated like price control arrangements." [9]

Exclusive territorial dealerships is a topic given particular consideration. A manufacturer's marketing plan may involve an agreement with one distributor not to locate or commission another within a prescribed area. This arrangement may be made to assure sources of supply or market outlets. It may include restrictive covenants which, if ancillary to the legitimate business purpose of the distribution plan, would be tested by the standard in Judge Taft's *Addyston Pipe and Steel*[10] opinion: "by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."

The Report reviews the meager precedents on these arrangements and concludes that "where an exclusive dealership forms part of an attempt to monopolize prohibited by Section 2, or the lesser degree of unreasonable restraint prohibited by Section 1, it should be held a violation. On the other hand, where an exclusive dealership is merely an ancillary restraint, reasonably necessary to protect the parties' main lawful business purposes, such a dealership should be upheld where its effect is not unreasonably to foreclose competition from the dealer's market." [11]

Apart from these general problems under Section 1, the Report highlights two issues involving proof of conspiracy. First, may conduct by corporations linked by common ties of ownership and control, or actions by officers and employees of the same corporation, constitute a conspiracy? Second, to what extent may "consciously parallel" behavior by two or more legally independent and separately controlled business enterprises evidence that their action stems from conspiracy?

Intra-enterprise conspiracy.[12] The Committee notes that restraining trade is not as such illegal and that "Section 1 of the Sherman Act, unlike Section 2, requires a plurality of actors for its violation."

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9 Report 26.

10 *United States* v. *Addyston Pipe and Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898).

11 Report 29.

12 Report 30-36.

It approves the doctrine that "concerted action of corporate officers acting on the corporation's behalf, or of subsidiaries acting on behalf of their parent" is not a conspiracy in violation of Section 1. "Subsidiary" is defined in the Report as "a corporation wholly or virtually wholly owned by a parent or a corporation with a majority of voting capital stock owned by a parent and a minority held by noncompetitors of the parent only for investment."

After reviewing the leading Supreme Court decisions, the Committee declares that "Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1." All members agree that "It seems indeed inconceivable to hold *per se* illegal the mere fixing by a parent of a subsidiary's price or production, or the selection by the parent of those persons with whom its subsidiary may or may not deal." As a limitation, most members, in addition, believe that "when a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor, Section 1 may be transgressed." Some members feel, however, that "in no instance can a parent and subsidiary be guilty of an offense that must be committed by more than one person," as in the case where the company does business through unincorporated branches, divisions or departments.

"Conscious parallelism." [13] Regarding "consciously parallel" behavior, the Committee adopts the following language of the Supreme Court in the *Theatre Enterprises*[14] case:

> "The crucial question is whether the respondents' conduct * * * stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. * * * But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

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[13] Report 36-42.

[14] *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 540-541 (1954).

Interpreting this language, the Committee asserts that the probative value of "conscious parallelism" in "establishing the ultimate fact of conspiracy will vary case by case," dependent upon a variety of factors in the particular business setting (as illustrated in the Report at page 39). Proof of independent business justification for the parallel action is always important evidence to rebut an agreement.

SECTION 2 OF THE SHERMAN ACT GENERALLY[15]

First dealing with the offense of "to monopolize," the Report states that "Monopolizing under Section 2 consists of monopoly in the economic sense—that is, power to fix prices or exclude competition—plus a carefully limited ingredient of purpose to use or preserve such power." Thus, it is pointed out that the existence of monopoly power "does not by itself prove the offense of monopolization." There must also be "the purpose or intent to exercise that power." This intent, distinguishable from a "specific" intent to monopolize, is "a conclusion based on how the monopoly power was acquired, maintained or used." The additional element of "deliberateness" is supplied if the monopoly power "was achieved or preserved by conduct violating Section 1" or "if it was, even by restrictions not prohibited by Section 1, deliberately obtained or maintained." This requires inquiry into the history and business policy of a monopoly.

The Report recognizes the defense of monopoly "thrust upon" the defendant by declaring that in such case "an individual company has not violated Section 2." In addition to Judge Hand's comments on this defense in *Alcoa,*[16] the Report quotes from Judge Wyzanski's opinion in *United Shoe Machinery*[17] that:

> "[T]he defendant may escape statutory liability if it bears the burden of proving that it owes its monopoly *solely* to superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law (including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority)." (Emphasis supplied.)

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15 Report 43-62.

16 *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945).

17 *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam* 347 U. S. 521 (1954).

The Report emphasizes that "whether monopoly power for purposes of Section 2 exists requires first a definition of the market within which it is to be measured." After stating the criteria for defining the relevant market, the Report turns to the critical question of how much market power is needed to constitute monopoly. On this aspect, the Committee concludes that "Measuring monopoly power depends upon a full evaluation of the market and its functioning, to determine whether on balance the defendants' power over the interrelated elements of supply, price and entry are sufficiently great to be classed as monopoly power. While the decisions illuminate the economic theory of the courts in evaluating these facts, they provide no magic formula for simplifying the inquiry." Among the guides suggested by the Committee are these: (1) "the primary fact of relative size—the percentage of supply controlled; (2) emphasis on *Columbia Steel's*[18] caveat that "The relative effect of percentage command of a market varies with the setting in which that factor is placed"; (3) scrutiny of market structure and behavior bearing upon control over price and competitive opportunity.

Finally, the Report states that "if monopoly power has been achieved through combination or conspiracy, Section 2 has been violated without more." Attempts to monopolize and combinations or conspiracies to monopolize require "proof of a specific or subjective intent to accomplish an unlawful result," an element not required where monopolization has succeeded.

II. TRADE OR COMMERCE WITH FOREIGN NATIONS[19]

The Report rejects "any proposal for blanket exemption of foreign commerce from the antitrust laws." It focuses on "clarification and improvement of the criteria for interpreting existing statutory standards" and approves the generality of the Sherman Act standards for application to foreign commerce problems.

On the issue of ***extraterritorial jurisdiction,*** the Committee concludes that "the Sherman Act applies only to those arrangements between Americans alone or in concert with foreign firms, which have such substantial and competitive effects on this country's 'trade

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[18] *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 527-528 (1948).

[19] Report 65-114.

or commerce * * * with foreign nations' as to constitute unreasonable restraints." Applying this test, the Report, relying upon distinctions made in the language of the *Alcoa*[20] opinion of Judge Hand, states that "conspiracies between foreign competitors alone should come within the Sherman Act only where they are intended to, and actually do, result in substantial anticompetitive effects on our foreign commerce." As a caveat, the Committee favors inclusion in decree provisions of "safeguards" designed "to protect any defendant 'from being caught between the jaws of * * * [any] judgment and the operations of law in foreign countries where it does business.' "

In analyzing the scope and content of the foreign commerce of the United States, the Committee rejects any implication in *Timken*[21] and *Minnesota Mining*[22] that "any American investment for production abroad involves *pro tanto* a restraint on actual or potential American exports." The Report concludes that "the words 'trade or commerce * * * with foreign nations' should be construed broadly to include not only the import and export flow of finished products, their component parts and adjunct services, but also as in domestic commerce, capital investment and financing." It is further concluded that "the mere financing by Americans of manufacturing, mining or other local activities abroad does not come within the Sherman Act."

Approving the identity of the standards of the Sherman Act for application in both domestic and foreign commerce cases, the Report nevertheless emphasizes, as stated by a dissenting Justice in the *Timken* case,[23] that "the circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint."

The Report recognizes that "antitrust is but one of several interrelated governmental policies touching on the foreign trade and national security programs of the United States." Accordingly, the Committee solicited from the Departments of State, Defense and Commerce, as well as the Foreign Operations Administration, views regarding the effect of antitrust on their programs abroad. From

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20 *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

21 *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951).

22 *United States* v. *Minnesota Mining and Mfg. Co.*, 92 F. Supp. 947 (D. Mass 1950).

23 *Timken Co.* v. *United States*, 341 U. S. 593, 605-606 (1951).

these the Committee concluded that there is "need for advance discussion with affected agencies concerning projected antitrust proceedings seriously involving any of the Government's foreign programs." The Committee recommends continuation and further developement of the informal liaison already existing among some of these agencies before and after bringing suit. Where matters go beyond the discretion of antitrust enforcement agencies, the Report notes that "resolution of any policy conflict may involve consultation with the President —at least until such divergence can be brought to the attention of Congress for legislative reconciliation."

Regarding programs for preserving the supply of critical and strategic materials from abroad, the Committee recommends further extension of the Defense Production Act's antitrust exemption. In addition, the Committee urges that "for a designated period beyond the Act's expiration, conduct requested or approved by the President shall not be subject to antitrust." This may be necessary to protect investments of large funds pursuant to acts approved by the President. This immunity, the Committee declares, should be conditioned upon express findings, when the conduct was undertaken, first, that it was required by national defense needs and, second, that prior consideration "was given to the possibility of accomplishing the same defense objectives by alternative methods involving less restrictions on competition." The Committee further recommends that the "amendment should also contain a provision for termination upon adequate notice if the President finds that such an agreement is no longer in the national interest." [24]

After reviewing the objectives and interpretations of the antitrust exemption in the Webb-Pomerene Act, the majority of the Committee recommends that on balance "the Act may well be retained until facts are adduced to show some changes in the present pattern abroad of state controlled buying agencies, state monopolies, and other combinations now part of the cartel policy prevalent in many parts of the world."

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[24] Report 109.

III. MERGERS[25]

The Committee first states that the background immediately preceding amended Section 7 discloses "the apparent Congressional objective of establishing more effective rules against mergers" and that "one clear object is to strike down mergers beyond the reach of the Sherman Act." Unlike the Sherman Act, Section 7 requires findings and conclusions "merely of a *reasonable probability* of a substantial lessening of competition or tendency toward monopoly." The Committee agrees with the approach suggested in *Pillsbury Mills*[26] that "no one pattern of proof can meet the requirements of all cases." In every case, there is need for "some study of the markets affected, the companies involved in an acquisition in relation to those markets, and the merger's immediate and longer range consequences for competition." This involves analysis "of the effect of the merger on relevant markets in sufficient detail, given the circumstance of each case, to permit a reasonable conclusion as to its probable economic effect."

In the case of vertical mergers, the question is whether "there is a reasonable probability that the merger will foreclose competition from a substantial share of the market." Regarding horizontal mergers, the issue is "whether the competition lost as a result of the merger may, in the context of the market as a whole, constitute a substantial lessening of competition or tend toward monopoly." The Committee stresses that "In no merger case—horizontal, vertical or conglomerate—can a 'quantitative substantiality' rule substitute for the market tests Section 7 prescribes."

More specifically, the Committee construes the tendency toward monopoly clause of Section 7 to mean (a) "a condemnation of any merger resulting in an appreciable movement in some market toward monopoly power" and (b) an intent "to hinder large companies' growth by acquisitions whose cumulative effect is an appreciable movement toward monopoly power." This clause, the Committee further believes, "therefore should be construed to show an appreciable growth toward monopoly by even relatively minor acquisitions."

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25 Report 115-128.

26 *Pillsbury Mills, Inc.*, F.T.C. Dkt. 6000 (1953).

IV. ANTITRUST POLICY IN DISTRIBUTION[27]

The Committee's starting point is the assertion that "the judicial process has evolved one fundamental accommodation to protect competitive distribution—resolution of every statutory doubt in favor of the Sherman Act's basic antitrust directives." Attention is called to the Supreme Court's language in the *Automatic Canteen*[28] case that "In the light of congressional policy expressed in other antitrust legislation," there is a "duty to reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress."

Refusals to deal.[29] On refusals to deal, the Report concludes that "In the absence of conspiracy or combination, refusals to deal by individual businessmen are generally safe from antitrust." But even individual refusals to deal "may become an integral element in a violation," of either Section 1 or Section 2 of the Sherman Act, or a factor in determining whether the Clayton Act or Section 5 of the Federal Trade Commission Act has been violated. Thus, while individual refusals to deal standing alone are entirely legitimate, the Report concludes that "only thoroughgoing factual inquiry into the surrounding business circumstances can characterize a refusal to deal as part of a restrictive course of conduct incompatible with antitrust objectives."

Exclusive dealing.[30] Concerning exclusive arrangements, including requirements contracts, the Report recognizes that on the one hand they "may in fact promote vigorous competition" or, on the other hand, may "seriously clog competition in the channels of distribution." To test their legality under Section 3 of the Clayton Act, the Report states that the "central inquiry" is "whether a system of challenged exclusive arrangements in fact 'forecloses' competitors from a substantial market." This standard, the Report continues, "goes beyond a 'quantitative substantiality' test but stops short" of the Sherman Act tests. Actual foreclosure is to be tested by "the ease with which

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[27] Report 129-221.

[28] *Automatic Canteen Co. of America* v. *Federal Trade Commission*, 346 U. S. 61, 63, 73-74 (1953).

[29] Report 132-137.

[30] Report 137-149.

rival suppliers can practicably secure consumer access in alternative ways." The Committee asserts that this criterion of "actual foreclosure," derived from the *Standard Stations*[31] opinion, "is incompatible with a mechanical application of the law to practices not inherently detrimental to competition." In the Committee's view, "the mere coverage of a substantial volume of commerce by exclusive dealing arrangements, while a factor to be considered, is not tantamount to 'foreclosure' of rivals from access to a substantial market, so that some analysis of particular distributive patterns is essential to any determination of actual foreclosure." However, actual foreclosure must satisfy Section 3's requirement of proof of "a reasonable *probability* of economic harm." This is clearly intended to condemn exclusive arrangements even though they have not ripened into actual unreasonable restraints violative of the Sherman Act.

Tying arrangements are considered by the Committee to have features distinguishing them from exclusive arrangements. Thus, the Report quotes the Supreme Court's observation that tying clauses "serve hardly any purpose beyond the suppression of competition." Accordingly, the Report adopts the view of *Times-Picayune*[32] that "tying arrangements that involve the 'wielding of monopolistic leverage' generate the requisite probability of economic harm whenever the seller occupies a dominant market position *or* if his arrangements cover a substantial volume of trade in the 'tied' product."

Resale price maintenance and "Fair Trade." [33] A highlight of the Committee's Report in this area is its analysis of the "Fair Trade" statutes legalizing resale price fixing of branded articles. The Report here takes a firm stand in favor of the basic principle of free competition required by the Sherman Act. It is acknowledged that "Fair Trade" laws "reflect some legitimate commercial aims. Nationally advertised and branded consumer commodities readily lend themselves to loss-leader and cut-rate merchandising that can impair substantial investments in business good-will." The Report, however, "does not consider 'Fair Trade' pricing an appropriate instrumentality for such protection. Since state enactments vest absolute discretion in suppliers

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[31] *Standard Oil of California* v. *United States*, 337 U. S. 293 (1949).

[32] *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 608-609, 611 (1953).

[33] Report 149-155.

for determining the level of a 'Fair Trade' price, the legislative price-setting authorization extends far beyond the essential guarantees of 'loss-leader' control. An effective 'Fair Trade' system, moreover, strikes not only at promotional price cutting, but at all price reductions which pass to the consumer the economies of competitive distribution."

"Apart from manufacturers' interest in preserving trade symbols and commercial good-will," the Report continues, " 'Fair Trade' pricing may enable distributors to extinguish price competition. A distributor whose inventory consists largely of 'Fair Traded' products can carry on business freed from the pressure and tribulations of price competition. Accordingly, distributors in some segments of the economy advocate 'Fair Trade' pricing by suppliers as a legal means for obtaining the benefits of a horizontal price-fixing arrangement that the antitrust law forbids. It is the Committee's view that 'Fair Trade' when used as a device for relieving distributors from the rigors of price competition is at odds with the most elementary principles of a dynamic free enterprise system." With few dissents, the Committee recommends Congressional repeal of the Federal statutory exemption of "Fair Trade" pricing in both the Miller-Tydings amendment to the Sherman Act and the McGuire Amendment to the Federal Trade Commission Act.

Price Discrimination[34]

The Report contains a full analysis of the various prohibitions upon discriminatory pricing contained in the Robinson-Patman Act. Here the guide is the principle of accommodating the Robinson-Patman Act to the dominant objective of free competition in the Sherman Act.

1. *"Goods of Like Grade and Quality."*[35] The majority of the Committee states that the criterion for the prerequisite of goods of "like grade and quality" is intended "reasonably to confine the price discrimination statute to comparable private business transactions," applicable "only in reasonably equivalent business transactions involving the sale of nearly identical goods." A Committee

[34] Report 155-221.

[35] Report 156-159.

majority recommends that "economic factors inherent in brand names and national advertising should not be considered" in construing this requirement but rather that the physical test of grade and quality should govern. Otherwise easy evasion of the statute could be encouraged through artificial variations in the advertising, packaging or design of the goods as a basis for price differentials. Accordingly, the majority believes that "Actual and genuine physical differentiations between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act." A minority of Committee members proposes that product differentiation through brands and trade names should be evaluated as "demonstrable *economic* differences" under the term "grade"; whereas the Committee majority assert that tangible consumer preferences between branded and unbranded goods "should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute."

2. *Competitive Injury.*[36] All but a few members of the Committee approve the recent Federal Trade Commission ruling in *General Foods*[37] which places upon the complaining party the burden of proving the injury to competition required by Section 2(a). There the Commission held that the test for judging market effects in all cases is "the substantiality of effects reasonably probable." Consonant with its belief of harmonizing this section with over-all antitrust policy, the Committee recommends that "analysis of the statutory 'injury' center on the vigor of competition in the market rather than hardship to individual businessmen. For the essence of competition is a contest for trade among business rivals in which some must gain while others lose, to the ultimate benefit of the consuming public." This does not preclude, the Report points out, a proceeding to curb injury to a single competitor through predatory price cutting designed to eliminate him from the market.

3. *Cost Defense.* Analysis of the perplexities of the cost defense proviso in Section 2(a) of the Act cannot be readily summarized.

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[36] Report 160-166.

[37] *General Foods Co.*, F.T.C. Dkt. No. 5675 (April 27, 1954).

Suffice to say, the Committee makes the significant recommendation that

> "Because any accounting apportionment of costs essentially involves subjective business judgment, not objective fact, we recommend that a reasonable approximation of production or distribution cost variances to price differentials—when demonstrated in good faith through any authoritative and sound accounting principles—suffice as a matter of law to meet the requirement for justification under the Section 2(a) cost proviso. Applied in this way, the Act should impede no price variation reasonably related to economies in 'any' of the seller's costs deriving from significant differences among customers or broad categories of commercial transactions." [38]

4. *Quantity Limits Proviso.*[39] The Report notes that this proviso "authorizes the Federal Trade Commission to impose a ceiling beyond which cost savings resulting from economical quantities, though not methods, might no longer be lawfully reflected in a lower price." The Committee deplores "this singling out and penalizing of the quantity discount system" as defeating the policy of primarily relying upon market forces to determine prices, because in the Committee's view, the quantity limits proviso ineptly sanctions "a crude form of price-fixing by administrative fiat."

5. *Meeting Competition Defense.*[40] With few dissents the Committee approves the result of the *Standard Oil (Indiana)*[41] decision which makes the good faith meeting of an equally low price of a competitor an absolute defense. This, the Committee asserts, "goes far toward harmonizing the Robinson-Patman Act with the basic tenor of antitrust policy." The Report offers the following guides to further interpretation of this proviso: (a) a seller should be deemed to have met a lawful price unless he knew or had reason to believe otherwise; (b) the defense "must authorize a seller to cope with competitive pressures so long as they exist, regardless of the frequency of the price reductions that competitive circumstances warrant"; (c) business actualities should allow reasonable adaptation of the defense of only

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[38] Report 175.

[39] Report 176-177.

[40] Report 179-186.

[41] *Standard Oil Co. (Indiana) v. Federal Trade Commission,* 340 U. S. 231 (1951).

meeting, not beating a competitor's price. Moreover, price under Section 2(b) is defined by the Committee as "the actual, laid down cost—exclusive of freight—paid by each buyer." And a seller should be required to show only "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor"; (d) a seller "should not be forced to meet a competitor's equally low price to the last fraction of a cent." Brand names and other product differentiation factors should also be considered for "In each case, the heart of the matter is whether actual competition, not merely a nominal price quotation, is equalized"; (e) the defense is not confined to *defensive* reductions to retain existing customers; and (f) "good faith" should be "utilized *solely* to test the seller's adherence to the basic objectives of the meeting competition proviso" and not "only as an incidental byproduct" of a scheme in violation of antitrust policy.

6. *Brokerage and Allowances or Services.*[42] The Committee notes that as a result of the judicial interpretations of the brokerage provision in Section 2(c), "the payment of middlemen's commissions to any but pure 'brokers' becomes *per se* illegal, even though valuable distributive services are performed, even when no adverse competitive effect results, and even where the challenged concession reflects actual savings in the seller's distribution costs." In order to reconcile this brokerage clause with "broader antitrust objectives," the Committee recommends legislative amendment to give effect to the exception "for services rendered" which would permit payment to all legitimate distributive intermediaries.

Sections 2(d) and (e) of the Robinson-Patman Act condemn promotional allowances or services not granted on "proportionally equal terms" to every other competing customer. While commending the Commission's criteria in the recent *Soap* cases[43] for interpreting these provisions, the Committee recommends administrative reinterpretations to place allowances and services on an equal footing with outright price discriminations which are illegal only when they cause adverse market effects and are not justifiable under one of the defen-

[42] Report 187-192.

[43] F.T.C. Docket 5585 (December 16, 1953).

sive provisos. This recommendation also applies to the brokerage section. The Committee thus favors "reconciliation of Section 2 (c), (d) and (e) with the remainder of the Act."

7. *Buyer Liability.*[44] Regarding the liability under Section 2(f) of a buyer who knowingly induces or receives a discrimination in price, the Committee approves the Supreme Court's interpretations in the *Automatic Canteen*[45] case. "To transgress Section 2(f) a buyer must not only obtain an unlawful concession, but also must be reasonably aware of its illegality." Conversely, a buyer is exonerated by showing that "the challenged price quotation was not in fact illegal, or that the buyer had no reason to believe otherwise." Other aspects of *Automatic Canteen* are approved by the Committee for reconciling the Robinson-Patman Act "with the broader antitrust policies that have been laid down by Congress."

8. *Criminal Prohibitions.*[46] The Committee recommends repeal of the criminal provisions of the statute. These, the Committee asserts, largely duplicate the civil sanctions of the Act and constitute "dangerous surplusage" that threatens competitive pricing practices with harsh criminal penalties.

9. *Functional Discounts.*[47] The Robinson-Patman Act does not expressly deal with functional discounts. The Report recognizes that a reasonable discount granted to single-function middlemen, such as traditional wholesalers, "could not be deemed inimical to competition with retailers who received no equivalent price reduction, since they did not in reality compete in dealings with any customer class." In the absence of adverse competitive effects, such discounts to single-function distributors are deemed to be legally safe in the typical case. In the Committee's view, functional discounts should not be denied to "split function" or other "integrated" distributors. If a businessman actually fulfills the wholesale function, the Committee believes this should make him eligible for a functional discount regardless of whether he also performs the retailing or any number

44 Report 193-197.

45 *Automatic Canteen Co. of America* v. *Federal Trade Commission*, 346 U. S. 61, 70-71 (1953).

46 Report 198-201.

47 Report 202-209.

of other functions. Furthermore, the Committee recommends that "suppliers granting functional discounts either to single-function or integrated buyers should not be held responsible for any consequences of their customers' pricing tactics," such as price cutting at the resale level. Finally, to avoid subterfuge, the Report recommends that "Only to the extent that a buyer 'actually' performs certain functions, assuming all the risk, investment and costs involved, should he legally qualify for a functional discount."

10. *Delivered Pricing.*[48] Treating delivered pricing, the Committee recommends that "the law carefully differentiate competitive and collusive delivered pricing." The Report approves Sherman Act adjudications which "condemn 'delivered' pricing only when part of a conspiracy." In the Committee's view, these decisions "by focusing the legal inquiry on the element of conspiracy and concert of action, tacit or express, accord with the overall antitrust policy and face up to the essential economic problem." The essential test is whether competition or collusion animate a given "delivered" price. In general, the Committee believes that "overall antitrust policy is served when sellers are free to meet competition in distant markets by quoting 'delivered' prices to equalize the freight advantages of more favorably situated competitors."

The Committee approves the recent Federal Trade Commission decisions[49] rejecting the "mill net return" criterion of "price" and adopting the "actual" price or laid-down cost to the buyer as the definition of price for Robinson-Patman Act purposes.

V. PATENT-ANTITRUST PROBLEMS[50]

The Committee affirms its belief that there is no inherent conflict between the inventor's private patent rewards and antitrust policy. Stressing the public benefits of "the early disclosure of patentable inventions," "their ultimate availability to the public upon expiration of the patent" and encouragement of "investment of risk capital," the Report concludes that, by protecting the patent owner's investment in new products and processes, "the patent seeks to increase competi-

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48 Report 209-220.

49 F.T.C. Dkt. 5253 (January 12, 1953); F.T.C. Dkt. 4878 (February 16, 1953).

50 Report 223-260.

tion by what is superficially an inconsistent grant of monopoly, but is in fact a mechanism intended to assure competition in invention."

Regarding *acquisition* of patents, the Committee recognizes that "Obviously a valid patent grant—whether basic or improvement—is a monopoly sanctioned by patent policy and not contrary to antitrust policy." It follows that "monopoly power individually acquired solely through a basic patent, or aggregation of patent grants should not by itself constitute monopolization in violation of Section 2" of the Sherman Act. Hence, violation of that Act "should, as the cases suggest, require abuse of the patent grant or proof of intent to monopolize beyond the lawful patent grants." With respect to *nonuse of patented* "inventions," the Report declares that, "Viewed either from the standpoint of patent policy or antitrust policy, nonuse should be considered in the context of particular factual situations. Mere nonuse is neutral." In appraising the antitrust significance of nonuse, the courts "have been quick to separate reasonable justification from design to restrain trade." The Report follows this distinction by concluding that "an improper purpose unduly to restrain trade, to monopolize, or attempt to monopolize through individual nonuse should give rise to antitrust liability. On the other hand where there is no affirmative showing that the purpose or effect of nonuse is unreasonably to restrain trade, to monopolize or attempt to monopolize, the patentee's conduct does not transgress the antitrust laws. Clearly, however, contracts, combinations or conspiracy among patentees to refrain from using or to refuse to license others to use the patented inventions should be deemed unreasonable *per se*."

Patent Licenses. The Report approves as the test for permissible limitations in individual patent licenses within the scope of the patent grant, the *General Electric*[51] case yardstick that the patentee may license "for any royalty, or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure."

Directing attention first to individual patent licenses, the majority of the Committee believes that a "patentee who is engaged in manufacturing and marketing the patented product may fix the prices at which his manufacturing licensee or licensees may sell." This approval

51 *United States* v. *General Electric Co.*, 272 U. S. 476 (1926).

is confined, however, to cases where there is no element of horizontal agreement and no plan aimed at or resulting in industry-wide price fixing. Some members, on the other hand, believe that "price fixing clauses in patent licenses should be proscribed by the antitrust laws under any circumstances."

The Committee approves court decisions holding that a "patentee may license the manufacture or use of the patented invention only within a certain field, or for a fixed quantity of manufacture or use," or within a fixed territory within the United States.

Where patent licenses include tying clauses, all but a few Committee members, contrary to the apparent trend of Supreme Court opinions, believe such clauses should be tested under the Sherman and Clayton Acts by the same criteria as in the case of unpatented tying products. "Accordingly, where the tying product is patented, the patentee should be permitted to show that in the entire factual setting * * * the patent does not create the market power requisite to illegality of the tying clause."

The Committee approves judicial decisions sanctioning a package license of one or all of the licensor's patents when made for reasons of convenience and without coercion to accept a license under one patent on condition of acceptance of a license under other patents. Package licensing should be prohibited, the Report states, "only where there is refusal, after a request, to license less than a complete package."

Regarding multiple patent licenses, the Report states that "In general, a patent license, valid standing alone, does not become invalid because other licenses are granted." To the extent that the multiple licenses involve horizontal agreement between the licenses, there is antitrust violation. Likewise, a cross-licensing agreement by itself entails no antitrust violation unless there is either an illegal license restriction or an illegal horizontal agreement beyond the license.

Interchange of Patent Rights. The Committee defines "patent interchange"—commonly called a "patent pool"—as "any arrangement for the interchange of patent rights where either one or more of the patent owners, or some separate entity, has the right to license others under the [interchanged] patents." The Report notes that "patent interchange may be essential to feasible patent utilization, or, in contrast, facilitate undue competitive restraint. In any given

case, a determination of legality requires an examination of the purpose of the interchange, the power possessed by the interchange when formed, and its operating practices." Thus, "an interchange is unlawful if formed with the purpose of regimenting an industry, fixing prices and eliminating competition, or threatening litigation with accompanying undue restraint of trade." The Report states that "should mere interchange be the sole means for commercial patent use, interchange which brings monopoly over products or processes covered by the interchanged patents * * * should not be held to violate Section 2" of the Sherman Act. Where such monopoly results, however, "a pool should be required to license all applicants without discrimination and at reasonable royalties."

Other Aspects. The Report recognizes that infringement suits may constitute legitimate efforts to enforce patent rights or, in contrast, be part of a scheme to restrain trade unduly or to monopolize.

Over the past few decades the courts have evolved the so-called patent misuse doctrine under which a patentee is denied equitable relief for direct or contributory infringement because the patent has been used to obtain control of commerce outside the scope of the patent. The Committee approves this doctrine but denies that in every case such patent misuse is a *per se* antitrust violation, "regardless of proof of the elements of violation required under the Sherman, Federal Trade Commission and Clayton Acts."

Committee views are divided on compulsory royalty-free licensing or dedication and on antitrust violation remedy. A majority condemns this as "penal rather than remedial in character, and hence beyond the Sherman Act's authority to 'prevent and restrain' violations." A substantial Committee minority feels that this remedy is within the court's power to decree when necessary to achieve effective competition.

VI. EXEMPTIONS FROM ANTITRUST COVERAGE[52]

The Committee recognizes that "To further some economic, political, or social objectives, Congress has shielded various activites from the rigors of competition." The Report disclaims, however, any purpose "to judge the importance of these asserted goals or the extent

[52] Report 261-313.

to which any one of them might be achieved without antitrust exemption."

1. *Regulated Industries.* This covers an area where "Congress has decided that in some industries competition shall not be entirely free." One type of regulatory statute expressly exempts certain matters from antitrust coverage whereas another statutory type, where no such exemption is specified, requires accommodation of the regulatory standards with the antitrust laws.

Dealing with mergers, rate agreements and primary jurisdiction, the Report analyzes the problems and judicial precedents relating to the respective roles of the regulatory agency and the courts. Without attempting to set forth the specific conclusions and recommendations of the Committee on each of these subtopics, the tenor of the majority of the Committee's thinking is indicated in certain general propositions. First, although views of the members diverge in other respects, the Committee agrees upon these governing principles:

> "This Committee, we repeat, endorses competition as the major rule in our private enterprise economy. We recognize that competition can be impaired either by conduct transgressing the antitrust laws or by government regulation fixing prices or rates or restricting freedom of entry. The Committee notes an apparent trend toward such government control. We call attention to the fact that such regulation tends to beget further regulation. For if one industry is regulated then it may be urged that its competitors should, in fairness, also be regulated. Apart from the need for regulation in any particular industry, we urge that moves toward regulation be taken only with full recognition of the effects of such exceptions to the policy favoring competition which, as a general rule, we endorse." [53]

Second, the Report focuses on orderly means for assuring that regulatory agencies put whatever premium Congress intended on competition. The Report concludes that ultimately it is the courts' "responsibility to say whether the Commission has been guided by proper consideration in bringing the deposit of its experience * * * to bear * * * in [determining] the public interest. Where Congress has been silent, the basic policy of our antitrust laws requires the court's conclusion that competition, at least where all other considerations

[53] Report 269.

involved are equal, is in the 'public interest.' In all instances, the courts, in reviewing agency discretion, should recognize that 'administrative authority to grant exemptions from the antitrust laws should be closely confined to those [instances] where the * * * [regulatory] need is clear.' " [54]

2. *Organized labor.*[55] At the outset, the Report states that "appraisal of the Nation's labor-management relations policy goes beyond this antitrust study." Accordingly, the Committee considers only union activities aimed at direct restraints on commercial competition. The Committee "believes that union actions aimed at directly fixing the kind or amount of products which may be used, produced or sold, their market price, the geographical area in which they may be used, produced or sold, or the number of firms which may engage in their production or distribution are contrary to antitrust policy."

After reviewing the case law on this subject under the antitrust laws and the Labor Management Relations Act of 1947, the Committee concludes that "to the extent that such commercial restraints not effectively curbed by either antitrust or Labor-Management Relations Act exist, then we recommend appropriate legislation to prohibit these union efforts at outright market control." Such legislation should give the government "power to proceed, on its own initiative, without formal complaints from others." Furthermore, "unlike the Sherman Act, such legislation should not contain provisions for private injunction." The Committee cautions, however, that "no one of our conclusions or recommendations implies any change of labor's freedom under the antitrust laws to act in concert in order to promote union organization or bargain collectively over wages, hours, or other employment conditions."

3. *Agricultural Cooperatives.*[56] The Report notes that statutory exemptions of agricultural cooperatives are "rooted, of course, in political and social as well as economic considerations." The Capper-Volstead Act exemption is given particular consideration. It is pointed out that "the precise bounds of no one of these enactments have

54 Report 270.

55 Report 293-306.

56 Report 306-313.

been fully marked out by administrative or judicial decisions."

The Committee concludes that "these statutory exceptions should not reduce antitrust prohibitions to a ghostly residuum. Congressional encouragement of agricultural cooperatives need not be incompatible with antitrust prohibitions against concerted restriction on agricultural output, coercion of competitors or customers, and monopoly power either achieved by means not within Capper-Volstead Section 1 or used to 'unduly enhance' prices under that Act's Section 2." The Report further states that "where cooperatives attempt to or actually obtain monopoly power by means not sanctioned by Section 1 of Capper-Volstead, the Sherman Act should apply even though the monopolized product's price is not unduly enhanced."

VII. ECONOMIC INDICIA OF COMPETITION AND MONOPOLY[57]

This chapter of the Report is "intended as an economic, not a legal analysis of competition and monopoly." The refinements of this technical and closely reasoned economic theory cannot be summarized without risk of doing injustice to the context as a whole. I therefore merely call attention to the topics in this part of the Report. First, there is an analysis of the economic definitions of "competition," "monopoly" and "workable competition." The latter is contrasted with the theoretical models of "pure" and "perfect" competition with the caveat that the Committee does "not regard these models as offering any basis for antitrust policy." The Report outlines the factors bearing on the identification of workable or effective competition from an economic standpoint but cautions that in any given situation, the relative significance of each factor may vary and that the theory "does not provide a standard of legality under any of the antitrust laws." Another section sketches the similarities and the striking dissimilarities between the legal and economic concepts of competition and monopoly. Since antitrust law and economics are both concerned with business facts and their market effects, the Committee expresses the hope that the economic analysis in this chapter may be useful "if means and criteria are developed for presenting evidence and weighing its relevance, materiality and probative value in a particular market context."

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57 Report 315-342.

VIII. ANTITRUST ADMINISTRATION AND ENFORCEMENT[58]

The Report first discusses the investigatory means available to the Department of Justice for securing evidence in civil and criminal proceedings, before and after complaints or indictments. The Committee recognizes that, at least before civil complaints have been filed, "present civil investigative machinery is inadequate for effective antitrust enforcement." Accordingly, the Report recommends legislation which would "authorize the Attorney General, in a civil antitrust investigation, to issue and have served upon any corporation, partnership or association a Civil Investigative Demand. This would require the production of (relevant) correspondence and other business records. * * * not privileged, in the possession of the party served." The Demand "must describe the records and data sought with reasonable specificity, so as fairly to identify the material demanded, as well as specify a reasonable time for its production." The Attorney General "should resort to this Demand where requests for voluntary production would probably prove not fully effective." [59]

The standards for governing the choice of civil or criminal proceedings are treated. The Report states that "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." The Committee was advised that the Antitrust Division is now following the policy of prosecuting criminally the following types of offenses: "(1) price fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize; (3) * * * [where there is] proof of use of predatory practices (boycotts, for example) to accomplish the objective of the combination or conspiracy; (4) the fact that a defendant has previously been convicted of, or adjudged to have been, violating the antitrust laws may warrant indictment for a second offense." The Committee generally indorses these policy standards but with two caveats: one, that "All criminal cases, however, should be confined to instances

[58] Report 343-393.

[59] Report 344-347.

where proof of violation is clear and the law is settled"; two, "that a second offense need not warrant indictment." [60]

Once the decision to proceed is made, then the question of resort to consent settlement procedures may arise.[61] The Report recognizes that "to the Government, caught in the vise of increasing complaints and decreasing enforcement resources," the economy of consent settlement "may make or break enforcement success."

Realizing the importance of the consent settlement process, the Committee rejects "any notion of its curtailment." More specifically, to save "time and money," the Report urges "pre-filing negotiations whenever the Division deems it feasible for efficient enforcement." To further ease the consent settlement process, the Department should "negotiate consent judgments with fewer than all defendants." In addition, the Report suggests that duplication of negotiation with both the Trial and Judgment Section staffs be minimized and that the Division should no longer require "defendants to submit the initial draft of a consent judgment." Instead, this should be done by the Department "in response to a good faith request by defendants."

The Report focuses on means for simplifying present protracted and expensive antitrust "pretrial and trial proceedings." [62] Only some of the more important recommendations are here summarized. First, the Report recognizes that "each antitrust case, public and private, should be assigned, as a regular practice in all districts, promptly after the action has commenced, to one judge for all purposes." Further, the Committee urges that "where pleadings do not present issues of fact or law with sufficient particularity for efficient trial preparation, the court and counsel should promptly undertake to particularize the issues to be tried by some suitable procedure, such as a motion under Rule 12(e), a pretrial conference, or interrogatories under Rule 33. The Report urges that in all antitrust proceedings, the "*Oregon State Medical Society*[63] opinion should be the guide where the proof offered by either party reaches back more than a reasonable number of years." However, the Report

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[60] Report 350.

[61] Report 360-361.

[62] Report 362-366.

[63] *United States* v. *Oregon State Medical Society*, 343 U. S. 326 (1952).

cautions that "the plaintiff should never be prevented from offering direct evidence of the commencement of an alleged antitrust offense—whether under the Sherman, Clayton or Federal Trade Commission Acts—no matter when it occurred."

Problems of obtaining effective relief are also discussed. Toward this end, the Report urges, first, an increase of from $5,000 to $10,000 in the per count ceiling on criminal fines.[64] In considering the civil remedies of divorcement, divestiture or dissolution, the Committee emphasizes, in the language of the Supreme Court, that "'In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints.'" With respect to divestiture, the Committee recommends the following guides: "(1) It should not be decreed as a penalty; (2) It should not be invoked where less drastic remedies will accomplish the purpose of the litigation; (3) It is important to consider the effect of a possible resultant disruption upon the industry involved, its cognate markets, and the public needs in peace and war; (4) * * * the Division must take account, in submitting a plan to effectuate the order, of its effect on the public as well as on the defendant and persons interested in it, as investors, customers and employees."[65]

The Report also considers the broader question of the extent to which Antitrust Division clearance and release procedures can halt violations before they occur.[66] Specifically, it has been suggested that the Department "should be authorized to issue advisory opinions as well as to issue rules and regulations under procedures similar to those employed by the Internal Revenue Service." The Report takes note of the objection that "As a prosecuting agency, the Department should not be expected to issue clearances in advance." Another stated objection is that "any such clearance would in any event be of narrow utility. Since it would have to be limited to the facts known at the time, it would be subject to revision in the light of

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[64] Report 352.

[65] Report 355-356.

[66] Report 367-369.

subsequent developments." Accordingly, although "the Committee recognizes the value of informal discussions" between outside and Antitrust Division attorneys, it "recommends no change in the existing procedures of the Department of Justice for advance clearances and releases."

The Report considers administration and enforcement problems specially related to the Federal Trade Commission, such as Trade Practices Conferences and informal settlement procedures. The Committee also recommends that the current penalty provisions of a $5,000 ceiling for each day an order under Section 5 of the Federal Trade Commission Act is violated should be repealed so that only the $5,000 per violation ceiling would be operative.[67]

On the important problem of related jurisdictions of the Department of Justice and the Federal Trade Commission in areas where both have statutory responsibilities under the Sherman and Clayton Acts, the Committee endorses the "goal of 'efficient cooperation' through dual enforcement." To this end some of the Committee recommendations are: (1) implementation of the system for exchange of information between the two agencies through notification by a card exchange procedure extended to all proceedings and rulings of both agencies; (2) "To avoid duplicating investigations, the investigative files should, to the extent permitted by existing law, be made fully available to the other"; (3) "The two agency heads should regularly meet to review significant investigations contemplated or commenced, discuss what proceedings, if any, should be brought, and which agency is best equipped to handle them"; (4) "It is basic to all relations between the two agencies that both should never for any reason, including differences in views as to the law or the facts, proceed against the same parties for the same offense growing out of the same factual situation." [68]

In addition to proceedings by the Department and the Federal Trade Commission, private suits may also aid antitrust enforcement. The Report recommends "vesting in the trial judge discretion to impose double and treble damages.[69] In all instances this would

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[67] Report 372-373.

[68] Report 376-377.

[69] Report 379.

recompense injured parties. Beyond compensation, the trial court could then penalize the purposeful violator without imposing the harsh penalty of multiple damages on innocent actors." The Committee finally emphasizes that "this proposal in no way saps the enforcement strength of private suits. Such proceedings have a vital role to play in aiding understaffed Government agencies to enforce antitrust prohibitions throughout the Nation."

Another Committee recommendation is a four year Federal statute of limitation for private antitrust suits.[70] The Report, after referring to the confusion and conflicts which have arisen on the applicable state statutes of limitation, states that "Against this background, none challenge the need for a federal statute of limitations. Currently, private antitrust action is rendered tedious by the needless magnifying of the issue of the applicable statute of limitations with arguments over which period governs, the events from which the statute runs, and the circumstances under which it is tolled—all made more complex by the chance of reference to the law of various states or to federal law. "Finally, varying periods encourage 'forum-shopping' and seem ill-suited for enforcement of a uniform federal policy."

IX. CONCLUDING PERSONAL OBSERVATIONS

In my opinion, the Report as a whole moves significantly in the direction of strengthening the antitrust laws without sacrifice of fairness in their administration and enforcement. I have already mentioned one outstanding feature in the Committee's unanimous affirmation of the basic principles of antitrust policy.

Another salient aspect is the limited number of recommendations for legislative action. None of these affects the primary standards of the Sherman Act or other cardinal components of antitrust policy. But these limited legislative recommendations should not obscure the numerous recommendations looking toward clarification and improvement of the criteria of statutory interpretation, administration and enforcement. The Committee throughout its deliberations was guided by the belief that legislative revision should not be proposed whenever prevailing precedents of interpretation and admin-

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70 Report 383.

istrative policy permitted effectuation of the Committee's proposals for resolving inconsistencies and defects short of legislative action.

Next I stress the value of the Report as a clarifying analysis and restatement of important areas of substantive antitrust doctrine. This was hammered out in vigorous professional debate over the true meanings of judicial and administrative opinions whose ambiguities had aggravated the inherent uncertainties of antitrust about which lawyers long complained. The fact that on virtually all subjects in the Report there is crystallization and synthesis of the major case law gives promise of better understanding of antitrust doctrine. The Report should reduce semantic difficulties which have impeded progress in resolving many inconsistencies more apparent than real. This common ground in formulation should also promote more intelligent joinder on antitrust issues requiring clear distinctions between what the law is and what the law ought to be.

The length of the Report and the complexity of its subject matter may lead one to overlook the singular extent to which its conclusions and recommendations commanded virtual unanimity within the Committee on fundamentals. In my estimate, most of the dissents represent differences in emphasis and degree. With few exceptions, they are directed at specifics separable from the basic conceptions characterizing the Report as a whole. Less than a handful of Committee members joined in the substance of the criticisms expressed in the general dissent of one member. I express my respect for the ability and sincerity of each of these dissenting members. But the fact remains that in the professional forum of the Committee, all but these very few subscribed to the general tenor and recommendations of the Report.

From the mass of legal and economic factors that comprise the corpus of antitrust, the Committee succeeded in identifying for study and analysis those controversial issues which present the key problems of antitrust statecraft today. The Report is not written as an antitrust hornbook of unerring directions on black letter text. Its guides, drafted in precise and technical terms, are intended for close and serious professional scrutiny. Many of the general antitrust standards approved by the Committee can be applied to specific factual situations only by balancing the need for flexibility against the desire for certainty. Yet it is hoped that the Report's statement and clarifica-

tion will offer improved guides for the bench, the bar and the American business community which depends upon legal counsellors for compliance with the antitrust laws.

Opinions may differ as to the reach of antitrust. The Committee, with few dissents, agreed upon the outer boundaries of antitrust to the degree they deemed to be compatible with a strong and effective antitrust policy without dilution of the competitive spirit consonant with the goals of the historic Sherman Act and its supplements in related antitrust statutes. Those who may differ on what these goals demand in antitrust doctrine and enforcement may either be thinking in terms of degree or perhaps in ideological differences beyond the Report's virtually unanimous beliefs.

THE SCHWARTZ DISSENT

by Louis B. Schwartz

The Majority Report would weaken the antitrust laws in a number of respects, and, even more important, it fails to adopt necessary measures for strengthening the law so as to create a truly competitive economy in this country. On 30 specific issues discussed in this dissent, the Report takes a position inimical to competition, either by approving existing narrow interpretations or by suggesting additional restrictions. Only 2 or 3 of its recommendations look the other way.[1] I do not mean to suggest that my colleagues of the Majority are consciously opposed to the antitrust laws. On the contrary, the report expresses their unquestionably sincere belief in competition of a sort and within limits; and some members of the Majority, whose records show them to be active proponents of the antitrust laws, have undoubtedly concurred in the Report on the ground that this is the best compromise that can be achieved in the present atmosphere. Moreover, since the Report is a composite product of many draftsmen, some chapters are much more favorable than others to the preservation of independent competitive enterprise. This internal contradiction is especially evident in the contrast between some portions of Chapter 1 enunciating general principles and subsequent chapters dealing with particular cases. But the upshot is clear. The central thread of the Majority Report unwinds from a core of belief that the competitive situation in this country is satisfactory, and that the antitrust laws require modification chiefly to temper their rigor.

This surprising verdict against antitrust is rendered without any factual findings regarding the effectiveness of the present program, or its beneficial or harmful consequences from the public welfare standpoint. Indeed, the Report states explicitly that the Committee is not a "fact-finding" body but only an advisor on "policy."[2] This narrow view of its function prevented the Com-

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* Copies of Prof. Schwartz's complete dissent for purposes of binding with the Report are available at the nominal price of 50c each by writing to this publication.

1 *E.g.*, to repeal resale price maintenance laws; to permit the United States to recover antitrust damages.

2 It is impossible to give intelligent advice on policy except on the basis of facts found or assumed. It is also evident that whenever the Committee does recommend

mittee from giving any direct answer to the one question that warranted bringing the Committee into existence, namely, are the antitrust laws successfully serving the purpose for which they were passed, and if not what should be done about it? To answer this question would have required a good hard look at financial and industrial structure and practice in the United States in comparison with the goals envisioned by the antitrust laws. This was not done. Instead, the Report offers a survey of economic theory and a surprisingly detailed review of decisional law with special emphasis on recent cases. The million-dollar investigation conducted by the Temporary National Economic Committee before World War II, the painstaking fact-gathering of Senate and House Committees since the war, the reports of the Federal Trade Commission and of private organizations like the Twentieth Century Fund[3] are substantially ignored.

I think we need very much more rather than somewhat less antitrust enforcement. Since the Majority do not deal directly with this central issue, I cannot tell whether the disagreement results from a different understanding of the facts with regard to the present organization of our economy, or from a different view of what ought to be. I shall begin by stating my view of what the antitrust laws are supposed to accomplish.

ANTITRUST GOALS

The purpose of the antitrust laws is to preserve liberty, *i.e.*, freedom of choice and action, first in the economic sphere but ultimately in the political sphere as well. Businessmen are to be free from direction or coercion of other businessmen. Buyers are to be free from concerted exploitation by sellers and vice-versa. No one is to build, alone or in combination with others, an indus-

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a significant change it acts on the basis of findings or assumptions as to how existing law is working. For example, the recommended repeal of the so-called Fair Trade Act is surely based on a determination that this legislation has cost consumers millions of dollars, unfairly limited the business of the most efficient distributors, and promoted horizontal price conspiracies, rather than on logical or doctrinaire grounds as suggested in the dissent of Mr. Montague.

3 See Stocking and Watkins, *Monopoly and Free Enterprise* (Twentieth Century Fund, 1951) including action recommendation by a committee composed of outstanding representatives of industry, labor, agriculture, and the professions of law and economics.

trial empire of such scope that others must perforce deal with him or on his terms. Entry into all trades and businesses shall be as free as physical limitations permit.

This maximization of freedom is desired because of the favorable economic consequences of competition, as is fully shown in the Majority Report; but that is not all. It is also desirable on principle and for its own sake, like political liberty and because political liberty is jeopardized if economic power drifts into relatively few hands. The centers of great wealth will own and influence newspapers, magazines and broadcasters, direct the development of universities, retain the ablest lawyers, economists and public relations specialists, finance political parties, infiltrate or wear down the executive agencies by which they are supposed to be regulated, and operate powerful lobbies so that the popular will itself is shaped to their needs.[4] In addition, individual dignity and responsibility are magnified in a free economy. Success will not depend solely on the favor of superiors in a great pyramid of power, but may be achieved also by striking out on one's own, winning fortune from the patronage of fellowmen. Freedom on the economic frontier is today's only substitute for the open Western lands which in other generations nourished American individualism.

Antitrust also performs the function of keeping governing power in the hands of politically responsible persons. Power to exclude someone from trade, to regulate prices, to determine what shall be produced, is governing power, whether exercised by public officials or by private groups. In a democracy such powers are entrusted only to elected representatives of the governed, or to agencies designated by the legislature. We are jealous of our economic freedoms even when elected legislators enact regulation. Much less are we prepared to acquiesce in the wielding of such power by trade groups meeting in private to promote the pecuniary interests of their members. When a monopoly or a trade association succeeds in exacting from the public more than a competitive

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[4] It is by no means intended to impugn the motives of the men who have built or operate these aggregations of power, or to suggest that the power has always been abused. On the contrary, the men in charge of the destinies of our corporate giants probably make each move in the corporate game from business motives which are entirely reasonable, and they are probably at least as public-spirited as other men. But self-interest can so easily be identified with public interest, that sincerity and good motives are not an adequate reliance against the dangers suggested in the text.

price, it is in a very real sense exercising the power of taxation without representation. To keep economic power diffuse is to postpone or avoid the day when a resentful public will demand direct political control or nationalization of industry.

Antitrust opposition to overwhelming Bigness serves still another purpose. Intellectual and artistic creativeness can be imperilled by the quality of sameness imposed on us when standards of thought and form are delivered into the hands of a few businessmen, whether they be movie producers, chain broadcasters, auto manufacturers or magazine publishers.

Everyone recognizes that many modern industrial operations cannot be performed on a small scale. Steel making, petroleum refining, railroad, steamship and air operations call for large business units. But how large? How much larger than technological considerations require? With how much incidental extension of operations into related fields that do not require large scale operation? And to the extent that large size is inevitable the question arises whether industrial giants should be free to use economic power devices like merger, exclusive dealing and price-discrimination with the same freedom as smaller units in the trade.

THE PRESENT INDUSTRIAL SCENE AND APPLICABLE LAW

In the light of the foregoing, let us take note of some salient features of the present industrial scene and the Majority's reaction to the facts.

A. *The Big-Two, Big-Three Pattern.* In the country as a whole or in large regions we find important industries dominated by a very few corporations. This is true in automobiles, steel, aluminum, tin cans, linoleum, cigarettes, liquor, tires, meats, biscuits and crackers, dairy products, among others. Many of these corporations were created by merger of enterprises that were already fully integrated from a technological point of view. Some of these businesses, *e.g.*, biscuit making, can easily and efficiently be carried on at relatively small scale. We know from a study by the Federal Trade Commission that the merger movement long ago passed the point where integration necessarily promotes efficiency, for the study

showed that medium or small operations were generally the most efficient. Economists tell us that when the number of sellers in a market is reduced to two or three, they operate much like a monopoly, even though they have not formally combined into a single legal unit.

What, then, is the deficiency in the law which has permitted this condition to continue? It is the rule which says that any corporation, no matter how big, may swallow up another if it has "good business reasons" for doing so, *e.g.*, "to expand," and if the government is unable to show that competition has been so restricted that others are "foreclosed" from a substantial market. This rule is in substance supported by the Majority although, as usual, the expression of general principles in Chapter I can be cited the other way. The Majority fails to condemn the *U. S. Steel* decision of 1920, where by vote of 4-3 the Supreme Court sustained the amalgamation of half the steel industry of the country, resulting in 100% monopoly in some lines. It views with equanimity subsequent phases of U. S. Steel's program of expansion by merger (*Columbia Steel* case) despite the avowed purpose of that acquisition to acquire a "firm market"—which in plain talk, means that competing sellers of steel are to be denied a chance to get the business of a previously independent steel processor by offering better prices and service than the great steel trust! The Majority Report reviews without protest a case like *Transamerica Corp.* v. *Board of Governors,*[8] holding that acquisition of forty-eight banks, doing 50% of the bank loan business of the Far West, shows no tendency to substantially lessen competition. *Pillsbury Mills,* a recent decision of the Federal Trade Commission, is hailed for ruling that a leading firm's acquisition of a competitor resulting in a 45% control of the relevant market could not be vetoed without a full economic analysis of the *Transamerica* variety.

The *Timken* case stands unchallenged although there the Supreme Court went so far in its solicitude for the right of amalgamation as to preserve interlocking control of international competitors

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[8] 206 F. 2d 163 (3d Cir. 1953), *cert. denied,* 346 U. S. 901 (1953). The judicial decision can be explained away as a holding that the administrative findings were insufficient, whatever the evidence may have justified. But the fact remains that the litigation was abandoned as a result of this case.

in the very same decree which orders the defendants not to use that control to integrate the operations of the two firms. In other words, the *Timken* decision finds that the American company's acquisition of control over the British firm was unlawful, assumes that the two firms can function as independent enterprises with no technological necessity for integration, directs that they function as competitors, yet leaves the ownership intact. This is also the pattern of certain consent decrees that purport to require "competition" among members of a family of enterprises under a single financial domination. Such decrees in favor of *departmental rivalry* lose sight of the true significance of *competition*. Departmental rivalry, such as prevails, for example, between the Chevrolet and Buick divisions of General Motors, or the "socialist competition" between the various production ministries of the Soviet Union, looks like competition and may tend to stimulate cost-saving and selling-initiative. Far-sighted managements encourage decentralized administration and departmental rivalry for this reason. It would never be allowed to go so far as to threaten the profits of the parent enterprise through unrestricted price cutting. In other words, departmental rivalry is a device employed *by management* to secure effective control of subordinate divisions. *Competition,* on the other hand, is an institution designed to subject management itself to the control of a market where others are free to produce and sell. Departmental rivalry would exist if General Motors had an exclusive legal franchise to manufacture all automobiles used in the United States.

If the *Timken* situation, involving common ownership of competing or potentially competitive enterprises, is left undisturbed, how much less is the Court likely to interfere with the type of economic empire which is coming to be known as "conglomerate" consolidation because it embraces subsidiaries engaged in different, though not unrelated, businesses. The issue is presented in the pending suit challenging the Du Pont hegemony in paint, chemicals, tires, and automobiles. Is an antitrust law adequate which finds this situation unobjectionable so long as the obvious *power* to influence the flow of trade among these subordinate units remains "unexercised"? I find no intimation in the Majority Report of concern over this type of power concentration.

To meet the situation described in the preceding paragraphs we need a law requiring advance approval of mergers when carried out by industry leaders, and placing upon the proponent the burden of proof that the transaction has technological justification and serves the public interest. This was proposed by the TNEC fifteen years ago and by the distinguished Committee on Cartels and Monopoly of the Twentieth Century Fund in 1951. Nothing less will stem the merger movement.

B. *The Apparent Immunity of Dominant Firms.* Antimerger measures are undermined and rendered almost absurd so long as a number of colossal enterprises remain apparently immune from the law even though they are of greater size than their combining competitors. If the existence of a General Motors is not incompatible with the public interest, it is hard for the courts to veto lesser combines, especially where it can be said that the proposed consolidation will be able to compete more effectively with the dominant company. Conversely, if the combination of Bethlehem Steel and Youngstown may be opposed, presumably on the assumption that they can survive as independents, what is the justification for a U. S. Steel twice as big as Bethlehem? The logic of the situation calls for a public reexamination of the justification for these very largest multi-billion dollar enterprises. This could be done by a statute patterned on the Public Utility Holding Company Act of 1935, under which the Securities and Exchange Commission simplifies the structures of oversize utility holding companies and confines each system to a technologically justified scope of operation.[6]

Far from considering that proposal, which was submitted to the Committee, the Majority Report is even hostile to the breaking up of monopolies when they have been proved to be illegal. Divestiture is to be invoked only as a last resort and only after giving consideration to "the effect of a possible resultant disruption upon the industry . . . public needs in peace and war." This sounds reasonable enough, until one turns to examine the kind of application such standards have had in the past. For example, when

[6] "If industrial concentration is to be permitted to stand, it is not unreasonable to require that it be justified." Committee on Cartels and Monopoly, Twentieth Century Fund. See Stocking and Watkins, *Monopoly and Free Enterprise*, p. 553.

Aluminum Company of America was held to be an unlawful monopoly, the court refused to split it up, principally on grounds that an aluminum company must be huge to compete with the huge steel and copper companies and that Alcoa's research laboratory was vital to national defense. The first ground leaves one to wonder how the very much smaller competitors of Alcoa can expect to survive if the judge correctly gauged the minimal size for survival in today's metal markets. But more important is the implicit notion that no monopolist in the field of structural materials need fear dissolution under the antitrust laws so long as he has U. S. Steel to point to as his surviving competitor. The national defense consideration in antitrust relief can be dangerously misleading. The very fact that our national existence can be thought dependent on a single organization, run by fallible human beings, suggests that precisely here private monopoly cannot be tolerated.[7] Even within the government we do not concentrate military research in a single unit, but enjoy the benefits of rivalry in technological developments between laboratories of various defense units. Furthermore, if aluminum research must be concentrated in a single organization, national defense considerations would suggest that the resulting technological advances should be made available to all producers on equal terms, by divorcing this "national" research enterprise from control of the dominant producer.

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7 *Cf.* the answer once given by the Civil Aeronautics Board to the suggestion that national interest would be best promoted by having a single American-Flag air carrier in international air transportation:

"To restrict international air transportation to one carrier would place upon one small managerial group responsibility for handling matters having tremendous national importance. To conclude that the public convenience and necessity require only one company in international air transportation would result in placing that company in a position of power which might enable it to interfere with public policies unacceptable to the management." *North Atlantic Route Case,* 6 CAB 319, 325 (1945).

See also Slichter, *Big Business—When Is It Too Big,* N. Y. Times, March 20, 1955. Prof. Slichter is no enemy of bigness; but he observes:

"Furthermore, the larger the organization, the greater is the danger that bright proposals of subordinate executives or technicians will be turned down by some overworked or unimaginative superior, and, as a result, will never receive proper consideration from the top management. There is no complete protection against this danger but among two or three independent concerns more good ideas are likely to reach top management from below than would be the case if these same two or three organizations were simply two or three divisions of one gigantic concern."

The Majority cite with approval the Supreme Court's dictum in the *National Lead* case, where divestiture was refused in part because there was "no showing that four major competing units would be preferable to two, or . . . that six would be better than four." Far from supporting the Majority's admonition for judicial restraint in divestiture, this remark demonstrates the opposite: that the Court is not sufficiently aware of the nature of oligopoly or the importance of multiple-seller competition in framing its antitrust judgments.

Size, then, can make itself appear indispensable: one has only to monopolize enough of an important technology and the courts will fear to lay hands on the structure. And size begets size: the hugeness of the leaders of one industry will save the monopolist in another industry from dismemberment. This contagious quality of bigness manifests itself in many ways in today's economy. Banks merge because only giant banks can handle the financing of giant industry. But a very large bank must make large loans and therefore courts big industry with special favor. Suppliers and customers are driven to integrate, if only to achieve the "countervailing power" upon which some economists have now been driven to rely in place of competition. Only big newspapers and broadcasting chains can provide the advertising coverage required by the great selling combines, and only the latter can pay the rates. The upshot is clear: integrate or disappear. Moreover, there has appeared an irrational psychology of competition among managements to be "Number One," "the Biggest," even if this is accomplished by buying out unprofitable firms. The same psychology is reflected in a stock market phenomenon: the invariably bullish character of any merger announcement, without regard to underlying business factors.

Only intervention by the legislature can roll back the tide of monopoly. The nature of the intervention has already been indicated. There must be a legislative investigation of the justification for our very largest aggregations of financial and industrial control, probably followed by a statute authorizing an appropriate agency to bring these enterprises into some reasonable relationship with technological requirements.

C. *Restrictions on Entry.* The American businessman has lost a considerable amount of his freedom to go into the trade of his choice. Certain businesses have been officially removed from the area of free entry. This subject is further explored under the heading of exemptions. It suffices here to note that although trucking is a classic example of an industry which should be governed by competition, it is now closed to anyone who cannot persuade a regulatory agency that there is "need" for more service, and, in addition, that existing carriers are unable or unwilling to supply the need. As if such legal barriers were not enough, the would-be entrepreneur who believes that he can meet these requirements faces years of litigation and delay simply because the undermanned agencies cannot keep up with their dockets, to say nothing of the opposition of those already certificated. In the seventeen years that the Civil Aeronautics Act has been in existence, not one new operator has received a permanent certificate to engage in domestic trunkline passenger service.

With regard to the mass of existing regulation restricting entry the Majority can agree to say only that *further* moves to substitute restricted entry in place of free competition should be taken only with "full recognition" of anticompetitive effects. We can be quite sure that the Majority's admonition will be followed. The proponents of these measures do invariably recognize fully the effect on competition. They expressly intend to displace it. Such things as safety regulation, navigation rules, etc., which are unquestionably proper subjects of regulation need not, however, be accompanied by restrictions on the right of entry. Nor can the necessary restriction of broadcasting on the same frequency justify a system of economic regulation which accords many of the available frequencies to the same or affiliated interests.[8]

In so-called "unregulated" business, entry is restricted by private control of raw materials or by existing sellers' domination of the channels of distribution. In this connection one need only consider the difficulties facing a man who would like to go into the

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[8] See the erosion and invalidation of the Federal Communications Commission ruling against multiple station ownership. *Great Lakes Television, Inc.*, F.C.C. Docket #10968, 23 USLW 2141 (1954); *Storer Broadcasting Co. v. Federal Communications Commission*, F. 2d (D.C. Cir. 1955).

business of manufacturing automobiles. Assume that he has a better car and the manufacturing resources to produce it cheaply. He nevertheless faces an insuperable marketing problem since almost all auto dealers are tied to the present producers by exclusive contracts or equivalent arrangements. A dealer might like to try his hand at selling this attractive new car, but he fears to lose his "franchise." It is obviously impossible to build a parallel nationwide dealer system. The new or foreign car therefore dribbles slowly into a few metropolitan areas. No one knows how much faster they might win acceptance if all auto dealers felt genuinely free to take a second line, or how much more rapid progress domestic autos would make if such a potential competition were unleashed.

"RULE OF REASON" AND CERTAINTY–CONFLICTING DEMANDS ON ANTITRUST ADMINISTRATION

One of the major issues which the Committee had to face was the powerfully supported proposal to reorient antitrust administration to give greater scope to the "rule of reason", and, by the same token, to cut down or eliminate the classes of restraint prohibited as illegal "per se." The Majority Report fortunately does not call for a general expansion of the "rule of reason"; but some of its specific proposals and the heavy emphasis placed on "full economic investigation" look in that direction. Furthermore, the plausible "rule of reason" argument for relaxing the antitrust laws is so likely to be pressed on Congress, the Courts, the Department of Justice and the administrative agencies that the precise significance of the proposal should be made crystal clear.

The "rule of reason" says that a restraint of trade is illegal only if it is likely to be harmful to the public.[9] The *per se* doctrine says that some restraints are so generally harmful that they are prohibited outright, without trying to determine whether in the particular case there may be more good than harm in the practice. The Sherman Act seems to say that *all* restraint of trade is hurtful to the public and therefore prohibited, but the courts soon

[9] To the extent that this shorthand statement differs from some of the discussion in Chapter I, I concur in the narrower view of the rule of reason. However, the statement in the text fairly expresses the conception of the rule of reason which dominates other portions of the Report.

restricted the prohibition to "unreasonable" restraints. The first twenty years of experience under the Sherman Act demonstrated that certain restrictive practices of large corporations could not be stopped under a rule of reason approach. Congress therefore supplemented the Sherman Act with the Clayton Act of 1914 which made certain practices illegal—mergers, tying and exclusive dealing, price discrimination—where the effect "may be" to substantially lessen competition. This test moves far in the direction of *per se* violation and has been judicially declared to render unnecessary in some cases the wide economic investigation appropriate to Sherman Act controversies. In addition, the Courts themselves began to hold that some restraints were illegal *per se* under the Sherman Act, particularly agreements to fix or influence prices,[10] to divide markets among competitors, or to drive a trader out of business by boycott.

The first thing to be observed about this distribution of antitrust prohibitions between rule of reason and *per se* illegality is that rule of reason affords an opportunity to justify the restraint in a particular case as harmless or even beneficial, but by the same token makes it difficult to forecast how the courts will judge the balance of pros and cons. In other words, the "uncertainty" of the antitrust laws, about which certain business groups complain, derives from the rule of reason and is inherent in it. "Per se" rules, in contrast, are quite certain just because they do prohibit absolutely and without a chance of justification, a situation which likewise aggrieves the critics of the antitrust laws. It is impossible to meet both these complaints. One can have more uncertainty and fewer *per se* rules, or less uncertainty and more *per se* rules. Antitrust critics will have to make a choice.

The second thing worth noting is that rule of reason is not merely a standard for judging lawfulness; it has procedural consequences of vast importance. It makes relevant the entire history of the industry, all evidence bearing on the good and bad purposes and consequences of the restraint, political and military exigencies possibly accounting for the restraint, conflicting expert testimony to explain phenomena like price matching, etc. This has two consequences: (1) It makes the proceedings intolerably long and expensive, putting

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[10] But cf. *U. S.* v. *Morgan* (The Investment Bankers Case), F. Supp. (S. D. N. Y. 1954).

a drag on enforcement and real burden on defendants; and (2) It operates differentially in favor of powerful defendants as against smaller units, since only the powerful can afford that kind of defense. In a *per se* case, on the other hand, inquiry should stop when the restraint has been identified.

Thirdly, one can discern a suggestion in some recent decisions that certain practices should be illegal *per se* when engaged in by companies dominant in their fields.[11] This development is one that the Committee might well have endorsed, and it is perhaps ripe for legislative declaration. The most powerful corporations should hardly find it necessary to bulwark their positions by exclusive dealing and requirements contracts. On the other hand, the small new producers may safely be permitted to establish footholds in the market by these means since those with whom they deal are under no great pressure to accept the restraint. Similarly, mergers of minor units of the industry may have no general significance, even if they have been competitors in some degree, and should be justifiable under the rules of reason, whereas the absorption of one of these units by a dominant firm may signal the doom of the other unit and constitute another step in the process of "creeping monopoly."

Recognition of the exceptional circumspection which great corporations must observe when it is a question of employing specially dangerous business power devices would not be a radical departure from modern standards of corporate obligation. Adolf Berle and others have already pointed out that our great corporations must and have begun to behave like agencies with public responsibilities, rather than mere private business aggregations.

ADMINISTRATION AND ENFORCEMENT

The chapter of the Majority Report dealing with Administration and Enforcement offers as clear a demonstration as any that the Majority operate on the undeclared assumption that we have had too much rather than too little antitrust enforcement. As elsewhere in the report, we are presented with an excellent technical analysis and a series of proposals many of which standing alone would seem

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11 See, for example, *Dictograph Products, Inc.* v. *FTC*, U. S. Ct. of App. for the Second Circuit, December 15, 1954, 23 LW 2293. This in my opinion is the real basis also for *Standard Oil Co.* v. *U. S.*, 337 U. S. 293.

reasonable enough.[12] But when they are all added together the total effect of the recommendations is clear: to restrict the Antitrust Division's power of investigation, to curtail use of criminal prosecutions, to slow up the filing of complaints, to encumber the exercise of prosecutor's discretion with novel internal administrative reviews on request of a defendant, to expand the use of the consent decree in a manner calculated to remove the last possibility of public scrutiny of this useful but dangerous practice which, among other things, shields the defendants from damage suits by private parties, to water down the threat of treble damage recovery, etc. There is not space here for a full analysis and rebuttal of all these neat proposals. I shall discuss a few whose significance might otherwise elude the uninitiated, together with some proposals for strengthening the enforcement which the Committee declined to support.

A. Civil Investigative Demand

A prominent feature of the report is the recommendation of the Civil Investigative Demand, a kind of subpoena that the Attorney General would use to secure information in antitrust investigations. On its face this sounds like an increase in the powers of the Department. That is not what some of the proponents of this measure have in mind and that will not be its effect. The whole debate about the Department's investigative powers arose not from a Department complaint that it had inadequate power, but from defendants' complaints that the Department's power to command information *by grand jury subpoena* was too extensive and untrammeled. Although the Report does not specifically recommend against the grand jury investigation, what is contemplated is the gradual displacement of the effective and expeditious procedure by the relatively ineffective Civil Investigative Demand. The attack on the grand jury subpoena procedure would hardly succeed so long as there was no alternative device for compelling defendants to disclose facts prior to the filing of a complaint. Now one is offered. Unlike the grand jury subpoena it cannot be used to require persons to testify, but only to

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[12] Some of the proposals are unequivocally worthwhile, *e.g.*, the inclusion of the United States among those who can recover damages for an antitrust violation. I agree also that criminal prosecution should not be used to test novel applications of the antitrust law.

produce documents. Moreover, a person may disregard the Civil Investigative Demand without risk until the Department of Justice obtains a court order requiring compliance. The burden of justifying the demand for information is significantly shifted to the prosecution.

What are the objections to the grand jury subpoena? We are told that it "debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality," and that criminal procedures should not be invoked where the Department of Justice does not initially contemplate indictment. This view entirely misapprehends the nature of Sherman Act violations, the investigative process, and the historic role of the grand jury. The Sherman Act does not have two categories of violation, one civil and one criminal. All Sherman Act violations are both civil and criminal. Until the facts are fully disclosed neither the grand jury nor the prosecutor can intelligently decide whether to exercise the discretion not to indict. A grand jury subpoena not followed by indictment does not tar anybody with crime. It is well known that grand juries subpoena witnesses as well as suspects. Moreover, the historic functions of grand juries have extended to civil matters regarded as of exceptional importance, *e.g.*, the conduct of public office, the state of public institutions. The grand jury was simply the investigating arm of the Crown and a device for screening out criminal complaints so insubstantial as not to warrant prosecution. Nothing could be more appropriate than the existence and exercise of this sovereign jurisdiction to compel great corporations, whose activities affect the public interest, to disclose the facts as to their acquisition and use of economic power.

I would have no objections to the Civil Investigative Demand if it were proposed as a supplement to existing enforcement powers. But in the light of the background of the proposal and the Report's animadversions on the grand jury subpoena in "civil" cases, I can only regard this as a step to curtailing the Department's most effective investigative device.

B. Criminal Penalties

The Majority's proposal "to take some account for inflation" by increasing the maximum fine for criminal violation of the antitrust law from $5,000 to $10,000 is another case where the Report

appears to be tightening up while actually adopting the least rigorous of available alternatives. Except for a few people who would like to see the criminal penalties abolished altogether, there is practically unanimous agreement that the 1890 fine level must be raised. $10,000 is the lowest suggestion made by any responsible person. It emphatically does not compensate even for the dollar inflation since 1890. The purchasing value of the consumer dollar stood at 184 in 1890 and has been approximately 60 in recent years.[13] $10,000 today would be equivalent to about $3,300 in 1890. In effect, therefore, the Majority recommend a 33% decrease in the maximum fine. The proposal takes no account of the much greater size of modern enterprises. It is utterly unrelated to the extent to which defendant may have profited from its violations. The argument in the Report that the small fines which have usually been imposed in the past show that a modest maximum will suffice misses the whole point of fixing a maximum. A maximum fine should be calculated for the worst conceivable case. The judge can exercise discretion within that range. If, then, the judge sees $5,000 as the maximum fixed by the legislative for the most aggravated violations, he will understandably impose lesser fines in the ordinary violation. A maximum of $100,000, limited perhaps to wilful offenses, would give the judges as well as defendants a better sense of the gravity of antitrust violations. If there were added a provision for assessment of damages in favor of all alleged victims in one proceeding following conviction of the defendant a rational set of sanctions would be in sight. At this writing the Judiciary Committee of the House of Representatives has reported favorably a bill to increase criminal penalties to a $50,000 maximum. It is easy to see which side of the antitrust controversy can derive comfort from this Committee's proposed $10,000 maximum.

C. Consent Decrees

The Report recommends that the Department of Justice enter into negotiations with prospective defendants for consent decrees. Such a practice will certainly have the advantage claimed for it in the Majority Report, namely, "increased cooperation between business and Government," saving time and money. What it will also

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[13] Source: Graphic Facts: Institute of Life Insurance, based on Bureau of Labor Statistics.

do is whittle away the last remnants of judicial control and public scrutiny in this area, and involve the Government in bargaining with a law violator not only as to the relief but also as to the nature of the accusation to be made against him. The proposal opens the possibility that the Government's complaint will be modified so as to be consistent with the relief that defendant is prepared to consent to. But the settlement of an antitrust case ought not to be a simple matter of bargain between the Department and the defendant. It results in a court order, enforcible by contempt proceedings. No judge should abdicate his own responsibility in this field, although admittedly he must rely to a considerable extent on the prosecutor's willingness to accept the relief embodied in the tendered decree. This judicial function is undermined if the Government does not state its case independently and in advance of the settlement. Furthermore, not only the court but also Congress and the public are excluded from any basis for exercising a critical judgment regarding the compromise embodied in the decree.

The Report admonishes the Department not to seek relief "deemed" by the Supreme Court to be unconstitutional, nor relief "which could not reasonably be expected after litigation." If the Department had observed these seemingly fair precepts, it would have cut the heart out of a number of consent decrees that powerful and excellently advised defendants have been willing to sign in recent years. Obviously no admonition is required with regard to asking relief that is clearly unconstitutional. Practicality and professional ethics would bar that. It is on the close questions of constitutionality that the Majority Report asks the Government to give up in advance. As appears from another section of the Report, the constitutional issue referred to here is royalty-free licensing. A divided Supreme Court held such a requirement unconstitutional in one case. A subsequent Supreme Court decision indicated that the question was regarded as unsettled. At least one district court in a well reasoned opinion decreed royalty-free licensing in a contested case, and numerous consent decrees have incorporated this provision. Royalty-free licensing may in some situations bear much less harshly on defendant than alternative relief. Why, under these circumstances, should this Committee take it upon itself to impugn the propriety of the Department's asking for such relief in the course of decree negotiation?

The worst that can happen to defendant is that he will have to litigate his case before a judge who will assuredly protect his rights. But see the effect on the prosecution of the combination of procedural and relief standards proposed in the Majority Report: The Government is encouraged to negotiate with defendant, even before filing a complaint, on the ground that this will save money and time. It is empowered to make settlement very attractive to the defendant inasmuch as private complainants will be left out in the cold, which would not be so if the case went to litigation. The prosecutor is told that his *maximum* goal in the bargaining is such relief of unquestionable constitutionality as can probably be gotten in litigation. Finally, he is assured that any concessions he makes will be substantially immune from judicial or other criticism. In this kind of stacked bargaining the Government will *never* get all the relief to which it is entitled. The only question is how much short of that the prosecutor is willing to settle for.

Instead of urging the Department to broaden its use of the consent decree, the Committee ought to have considered certain proposals made to it, but not reflected in the Report, for greater safeguards on the present consent decree procedure. One of these proposals would have required the Department to publish an opinion accompanying each consent decree, stating the Department's case, the defendant's position, and the reasons for the Department's acceptance of the particular compromise. It is well known that the necessity to give reasons for disposition help to assure that they will be reasonable. The other proposal would have made it a matter for the judge's discretion whether or not a consent judgment should constitute prima facie evidence in subsequent private antitrust suits. Present law provides that in no case shall a consent decree, entered before testimony is taken, be available to help the private victims recover antitrust damages from the defendant. Few victims are financially able to assemble the evidence required to prove an antitrust violation against a great combine. One would think it a proper part of the Government's responsibility to see that private victims are made whole. But in practice in the majority of antitrust cases which are settled by consent decree the Government is, in effect, bargaining away all real possibility of recovery by private victims.

D. Private Treble Damage Suits

The Majority Report makes a direct attack on private damage suits by proposing that the trebling of damages be made discretionary instead of mandatory. It is difficult to see what public exigency led to this proposal. Certainly the Committee made no finding of any adverse effect of the mandatory treble damage provision on the public interest. That provision has been in the law for sixty-five years and has been part of the British Statute of Monopolies for more than three hundred. A real showing of public disadvantage should be forthcoming before this relief for antitrust violators should be enacted into law. If the proposal had been linked to the suggestion discussed above, that consent judgments should ordinarily be given prima facie force against the defendant, something might be said for it in relation to a plaintiff who rides to recovery on the Government's proof. Surely an antitrust victim who is about to launch his own expensive investigation and lawsuit should not have to speculate whether years later a judge, in unfettered discretion, will limit recovery to actual damages. But the Majority Report is not even willing to permit recovery of actual damage in all cases. Coupled with a proper proposal to enact a uniform federal statute of limitations is an extraordinary provision to limit the damage period to four years even though the monopolistic conspiracy may have lasted for ten years before the victim even knew of its existence.

E. Segregation of Patent Issues

One more illustration of the tendency of the Administration and Enforcement proposals to blunt the edge of antitrust enforcement while undertaking merely to expedite disposal of cases: In the simple and apparently reasonable recommendation that "where the validity of patents is in issue, that issue should be segregated" lurks a formidable barrier to effective antitrust prosecution of patent pools, especially by private complainants. The proposition would have been entirely unobjectionable and worthwhile if there had been added to it a clause requiring the segregated patent issue to be tried *after* the antitrust issues. Without that clause the recommendation is an implied endorsement of the decision of the District Court of Delaware in *Zenith* v. *R. C. A.* that the patent issues will be tried *first:* The licensee of a patent pool refuses to accept package licenses and de-

clines to pay further royalties on the ground that the licensor is violating the antitrust law by a monopolistic aggregation of many patents, good, bad and indifferent. The licensor counters with a suit for royalties, which of course he should win if he has some valid patents and if licensee's monopoly theory fails. The *Zenith* rule requires the patent suit to be determined before the court takes up the antitrust issue, even though the validity of some of the included patents is not inconsistent with the theory of the licensee's complaint. In other words the licensee may be worn down with protracted and expensive patent litigation, before he ever gets a chance to show that even good patents cannot be enforced against him because of illegal monopolization. Meanwhile his contingent liability for royalties mounts. It will soon be clear to a licensee in this position that it is easier and safer to join the combine than to fight it.

F. Responsibilities of the Department of Justice, Federal Trade Commission and District Attorneys

Two other proposals on enforcement policy which the Committee ignored may be mentioned here. One would call upon the Federal Trade Commission to turn over to the Department of Justice for criminal prosecution the surprising number of price-fixing cases that continue to turn up. The administrative slap on the wrist is no answer to this kind of wilful violation of the clearest mandate of the law. The second proposal would call upon the Antitrust Division to activate the United States District Attorneys in the fight against trade restraint. The Sherman Act expressly puts the responsibility on the district attorneys, although it also contemplates supervision by the Attorney General. The complete centralization of Antitrust enforcement in Washington and a few field offices has had two unfortunate consequences: (1) Local, but quite effective, restraint of interstate trade goes unpunished because of staff limitation at Washington; and (2) The antitrust laws have lost the kind of grass roots support that would be forthcoming if the district attorneys were enlisted in its enforcement and educated in its significance. These district attorneys become judges and senators. The antitrust program cannot help but suffer if they develop the attitude that this law is an esoteric regulation dear only to a group of specialists in Washington.

DISTRIBUTION PRACTICES

Chapter IV of the Report dealing with distribution practices is so workmanlike an analysis of present law that it seems almost ungracious to point out that, with one notable exception, the changes it recommends are in the direction of retreat rather than advance for the antitrust laws. The exception of course is the recommended repeal of resale price maintenance laws, with which I enthusiastically concur.

I dissent from "actual foreclosure" test espoused by some portions of this chapter. It is inconsistent with the Clayton Act conception of stopping restrictive practices before they do demonstrable harm. Where a dominant company begins to require its distributors to deal exclusively with it, I would strike the practice down without waiting for the company to sign up so many distributors that competitors experience difficulty reaching the consumer market. The suggestion at one point that a manufacturer might lawfully "preempt" all intermediate distributors if rivals "may easily cultivate their own channels of distribution" seems to me a gratuitous invitation to restrain trade.

I dissent from the Majority's espousal of the proposition that charging different prices to purchasers of the same product, who compete in its resale, does not establish a prima facie violation of the Robinson-Patman Act. The Majority would follow the Seventh rather than the Second Circuit in this regard, and require proof of injury to competition. The vice of this rule is best illustrated by the Seventh Circuit decision which adopted it: The dominant producer of switches sold them at grossly discriminatory prices to various furnace manufacturers. Upon proof that the furnace manufacturers who paid the highest prices for switches nevertheless sold furnaces at lower prices than their furnace competitors, the Seventh Circuit concluded that price discrimination in switches had not injured furnace competition. I do not see the virtues of a rule that legalizes price discrimination against one's most efficient customers, those who are able by virtue of superiority in other branches of their business to overcome the disadvantage imposed by the price discrimination. Moreover, the Majority conceive that proof of injury fails if the buyer can be shown to have "alternative means of access to goods at the lower price." Supplying proof of injury according to these standards will prove expensive if not impossible for the Federal

Trade Commission. To require it is once more to revert to inappropriate Sherman Act standards in interpreting the Clayton Act.

I dissent from the proposition that FTC orders directing Robinson-Patman Act violators to cease and desist from discrimination should automatically lose their force whenever the company bound by the order faces "a new competitive situation" or "responds to a new business development." Under this proposal violation of the order can only be established by the same evidence as would be necessary to establish an original violation of the Act.

I dissent from the attack on the quantity limits proviso, not because I am convinced that the proviso is useful, but because the pending case on this subject is the first time in the eighteen years of the Act's existence that the rule has been invoked. In the absence of real experience this would appear to be unseemly haste in urging Congress to repeal a law that small businessmen regard as important protection against price discrimination.

I join in Walter Adams' dissent as to the modification of the defense of "good faith," particularly in view of the stated purpose of the Majority to make this defense good for any meeting of a competitor's price that is not "an incidental by-product of a scheme to monopolize * * * " Again a Clayton Act practice is being treated as a Sherman Act restraint problem.

I dissent finally from the disavowal of the *Rigid Conduit* case, in which the FTC issued a cease and desist order against dominant firms in an industry where all were doing business at delivered prices. The Majority believes that it should be necessary for the Commission to prove conspiracy among the firms, and that by more than "conscious parallel action." The *Theatre Enterprises* case upon which the Report relies was a Sherman Act proceeding, and the Supreme Court held only that conscious parallel action did not *require* an inference of conspiracy. Conspiracy is not a necessary element of a violation of the Clayton Act or of Section 5 of the Federal Trade Commission Act. The significance of parallelism under these sections is not conspiracy, but probability of injury to competition. If only one firm in an industry is selling on a delivered price basis some buyers may be able to gain from proximity to another producer; but if all sellers use the same system, buyer choice is foreclosed. In this case, as in others, the Committee seems too eager to retreat from existing law against which there is little pragmatic evidence.

The Robinson-Patman Act is an unhappy necessity. It tends to encourage price rigidity inconsistent with Sherman Act objectives; but on the other hand it curbs the power of corporate giants who would otherwise be relatively free to undermine their own smaller competitors by price discrimination, or to raise havoc with competition among their customers. So long as we permit unregulated industry to amalgamate into units of monopolistic power, it will be necessary to restrain their freedom in pricing, just as Sections 2, 3 and 4 of the Interstate Commerce Act are required to prevent discriminatory practices by railroads which enjoy legal protection from competition. If the Majority had made realistic proposals for decartelizing the American economy, I could readily have agreed to retreat on price discrimination. But when they combine a *status quo* position on Bigness with an attack on the Robinson-Patman Act, I see only a strengthening of the power of the already-powerful.

PATENT RECOMMENDATIONS OF THE REPORT

If this Committee had been assembled to restate existing law, there could be little quarrel with most of Chapter V on Patent-Antitrust Problems. But the Attorney General needed no Committee like this to tell him what the law is. He and the nation would like to know whether this law is working satisfactorily or whether it should be changed. The Majority Report meticulously reviews the cases attempting to reconcile patent and antitrust principles, and finds little to criticize in the series of landmark decisions favoring the patentee at the expense of competition. Since it is common knowledge that the law has not prevented the growth of comprehensive patent pools that dominate important sectors of technology, I cannot join in a judgment that the antitrust laws as presently construed are adequately dealing with the problem.

The first of the landmark decisions on which the present pattern of restraint of trade by patent has been built is Justice Taft's decision, in the old *General Electric* case, that so long as GE held the dominant lamp patents it might require Westinghouse not only to pay royalties for the use of the invention, but also to avoid price competition with GE. It is difficult to see why a power to fix prices is a necessary or proper part of an inventor's reward. It has never been shown that this dangerous power must be added to the other

benefits of a patent in order to provide adequate incentives for invention, disclosure or licensing. A patentee obtains the exact value of his lawful monopoly on the invention when he exacts all the traffic will bear in the way of royalties, or by exercising his privilege to be the sole maker or seller. When the patentee seeks, in addition, to control his licensee's prices it must be because he fears that the advantage which he has in technology is more than overbalanced by his competitor's advantages in plant efficiency, management, labor relations, and cost of materials, so that whatever he charges in the way of royalties will still leave his competitor in a position to sell for less. But there is no justification for depriving the public of the benefits of competition in all these other aspects of production and distribution merely because the patentee is entitled to a protected price for his inventive contribution. Stated another way, a Westinghouse lamp employing GE's invention might have embodied two cents worth of GE inventive contribution and twenty cents worth of unpatented material and workmanship furnished by Westinghouse. The Majority Report recognizes that a patentee of some small device, *e.g.*, a radio switch, may not fix the price at which a licensed manufacturer sells radio sets incorporating the patented switch. This is on the ground that the patentee would be controlling the price of more than his invention. The same principle should apply where the patentee endeavors to control not merely the price of his idea, but the price of a much more valuable object that somebody else manufactures and owns. Finally, even if something can be said in favor of price-fixing of manufacturing licensees by an inventor who is not himself competing with his licensees, or who together with his licensees is a small factor in his industry, it would plainly be unnecessary and dangerous to permit dominant firms in an industry to play this game of "I fix your price on this product under Patent A, and you fix my price on that product under Patent B."

The vice of the actual decision in the *General Electric* case goes even further in a respect which has been little observed, although it was brought to the notice of the Committee. GE was not only allowed to fix the price at which Westinghouse sold lamps; it was also allowed to compel Westinghouse to imitate GE's resale price maintenance policy. The essence of this policy was to maintain a resale price at the consumer level by dealing only through distributors and subdistributors who would agree to function technically

as "agents." In short, Westinghouse was compelled to abjure selling lamps to independent distributors. How such dictation to one's competitor can be regarded as a normal reward of invention eludes me. Yet the *GE* case stands as a bastion of the Majority Report.

A second bastion is the famous *Cracking Patents* case together with all its progeny standing for the proposition that the Sherman Act does not require competition in the licensing of patents.[14] That is the nub of the Majority Report's position on patent pooling; it is lawful to combine patents of various owners up to the point where they dominate the entire technology, so long as the patentees exercise their power reasonably. I had thought the Sherman Act forbade all monopolies, not merely those which misbehave; and as a practical matter it is almost impossible to police the "reasonableness" of the terms demanded by a patent pool controlling hundreds or thousands of patents. Everyone realizes that cases will occur where the owners of two patents must combine them by transfer or cross-license in order to achieve a marketable product. But to transpose this simple solution to cases of "patent deadlock" between giant firms whose combination will compel entire industries to pay non-competitive royalties is to ignore the crucial element of monopoly in the latter situation. When, as in the *Cracking Patents* case, several of the largest integrated petroleum companies develop and patent competing refining processes and are engaged in competitive licensing, we may be sure that none of them is going to abandon the field because of patent deadlock, even if we refuse to authorize them to pool their patents. If the *Cracking Patents* case had gone against the defendants a number of results might have followed, all preferable to the patent pool from the point of view of the public interest. The patent conflict between the companies might have been pressed to decision of the Supreme Court. Some or all of the patents might have been held invalid, thus opening the technology to general free use. Certainly the chance that a smaller licensee or infringer would be able successfully to challenge this combined array of patents was much reduced when the Big Four closed ranks. A second consequence of barring industry-dominating patent pools might be that

14 This is not the necessary interpretation of Justice Brandeis' opinion, as Chapter I of the Majority Report fortunately points out. I speak here of the treatment in Chapter V Patent-Antitrust Problems.

one of the partners would ultimately establish its exclusive right to some or all of the process—but meanwhile there would have been a powerful incentive for research to produce other non-controlled processes. A third possibility would be independent competitive licensing.

A third major example of the willingness of the Majority to accept without question present law subordinating antitrust to patent considerations is the endorsement of the *General Talking Pictures* case. This involved an incident in the program of the electronics pool to regulate the industry by confining licensees to particular fields of use. Reading the Majority Report one would not even be aware that there had been responsible criticism of the practice of licensing with restrictions on use, quantity or territory. Yet, only fifteen years ago, the Temporary National Economic Committee, following the greatest organized investigation of monopoly questions ever conducted in this country, unanimously condemned restrictive licensing of this sort.

Finally, it is worth noting two instances in which the Majority Report does recommend a change in existing law, in both cases to weaken it. It is settled law that sale of a patented product on condition that the purchaser buy another product is an illegal abuse of patent power. The Majority Report however would change this to require the Government to prove that the patent was "broad and basic" before the tying clause becomes illegal. Again, the Majority Report on the basis of a single district court decision opens the door to control by the patentee over the use of his patented product *after sale,* where the restriction is "reasonable," despite a long line of Supreme Court decisions pronouncing flatly against controls by the patentee after he has realized the monopoly reward by sale. The Report makes no showing of hardships under existing law or of public advantage to be gained from the proposed changes. The suggestions seem to derive from pure ideology—a conviction, not derived from practical observations, that businessmen should be allowed to justify a restraint on the ground that it is reasonable. Justification is permitted for very many classes of restraints; but it is also elementary in this field that some classes of restraint may not be justified. The more classes of restraint that are brought into the justifiable group the more uncertain the law becomes. Uncertainty is one of the principal complaints leveled against the antitrust laws by businessmen. Surely the law ought not to be amended in the

direction of less certainty and less effectiveness without compelling practical reasons.

I have dealt elsewhere with the Committee's strictures against royalty-free licensing as a mode of relief. At this point I add only the observation that neither I nor anyone else recommends royalty-free licensing as a "penalty" or "forfeiture." An injunction against exaction of royalties so long as may be necessary to reestablish competitive conditions is all that is in question. In some situations this might call for no more than a temporary loss of the right to collect royalties. The Majority Report concedes that an antitrust decree may properly restrain pending infringement suits. Yet the liability of licensees or infringers in such suits may well exceed any possibility of "reasonable" royalties that the antitrust defendant could collect in the future. Moreover, the infringement suits seek to recover on liabilities already accrued, vested rights, unlike the mere prospect of profits which alone is at stake in the royalty-free licensing provision. To condemn royalty-free licensing as deprivation of property without due process, while acquiescing in decree provisions enjoining pending infringement suits is a logical contradiction.* Both cases involve a loss of valuable rights (so does a restriction to reasonable royalties, which at once reduces the value of the patent in proportion to the reduced royalty which it can command); but both cases afford due process in the sense that the loss is imposed only after full hearing pursuant to reasonable legislative mandate to frame a decree that shall restore competition.

LEGISLATIVE, JUDICIAL, AND EXECUTIVE EXEMPTIONS FROM THE ANTITRUST LAWS

One of the most disturbing phenomena in the antitrust field is the proliferation of exemptions from the law, discussed in Chapter VI of the Report. Every exemption cuts down the area of our economy governed by free competitive enterprise; and, while one must recognize that competition alone will not always provide adequate protection of the public interest, the inroads of protectionism in domestic trade should be kept to a minimum. One would suppose that the first duty of a Committee like this would be to advise the administration whether the exemption process had gone too far. Yet the

Exemption Chapter opens with a declaration that the Majority will not attempt to pass judgment on this question of policy. Instead, the Report undertakes merely to say whether existing statutes are being interpreted in accord with "legislative intent." Since we have not felt bound by existing legislation in other parts of the Report, which recommend a number of changes in present law, I am unable to account for the Majority's diffidence here. Much of the legislation reviewed in this part of the Report, *e.g.*, the Motor Carrier Act, the Federal Communications Act, the Civil Aeronautics Act, was passed during the Depression of the Thirties. It was a time of desperation when we nearly abandoned free competition entirely in favor of industry self-regulation under NRA. Surely it is time for a fresh look at policies born in this atmosphere. Congress may wish to change its intent.

Even within the self-imposed limitations of the Majority, it is regrettable that the Report does not clearly disavow a number of judicial, administrative and executive actions which have unduly expanded the exemptions. For example, the motor truck business is one that almost any disinterested economist would say should be competitive. Yet the 1935 Act restricted entry and empowered the Interstate Commerce Commission to authorize mergers that would otherwise violate the Antitrust Law. The *McLean* case discussed in the Majority Report involved a tremendous merger of truck lines into Associated Transport Inc. The ICC approved it over the opposition of the then Attorney General and the Department of Agriculture. The Supreme Court, by a vote of 5-4, refused to require the Commission to find, as a prerequisite to approval, that merger on this scale was requisite to effectuating the national transportation policy. Instead, the Commission was told in effect that where a given transportation objective can be achieved either through merger or by some other means not involving impairment of our competitive system, its decision to take the merger route will not be questioned. The beneficial effect attributed to the Associated Transport merger was the creation of a single ownership through-service from Florida to the Northeast. However, the lines which were consolidated were not only linked end to end on the North-South route; they also were in competition on parallel routes over thousands of miles. This competition was eliminated by the merger. Another way to achieve integrated through-service would have been to permit several of the

companies then operating on segments of the route to extend their service, as they would have been glad to do. We would then have had all the benefits of the merger, plus competition on the long haul, but without sacrifice of the competitive mileage. The full extent to which public interest has been subordinated to private gain in mergers is revealed by the fact that our regulatory bodies have not been given power to compel mergers in the public interest. They can only approve mergers voluntarily submitted by the industry groups. The situation clearly calls for Congressional reconsideration.

Another serious inroad on competition is the growing practice in the transportation industry to subject rates of individual companies to industry-wide discussion and agreement. The Majority's treatment of this subject is necessarily emasculated by the preliminary decision not to pass judgment on the necessity for these arrangements, but only to debate what existing law seems to require or permit. For this same reason the Report is equivocal also regarding restrictive practices in the steamship trade, where, by agreement among the members of the shipping conferences, a ten or twenty percent penalty rate is charged against shippers who do not refrain from patronizing non-conference vessels. It is to the credit of the Committee that the discussion does reveal a genuine concern with the extent to which this cartelization has been permitted to go.

The Report fails to identify several quite important statutory exemptions that ought to be reexamined in any thorough appraisal of the antitrust laws. The multi-billion dollar insurance business, for example, has been singularly successful in retaining its freedom to cartelize its share of interstate and foreign commerce. For a long time there has been on the books an unqualified exemption of marine insurance. The rest of the insurance business secured an exemption under the McCarran Act, which purports to make the federal antitrust law inapplicable to the extent that the business is regulated by the State. This has a plausible "states rights" sound, until one recalls that regulation is not a substitute for competition but only a supplement. Most assuredly *state* regulation is not going to provide any substitute for competition in keeping insurance rates down. In the first place, state regulation is primarily concerned with the financial security of the insurers, *i.e.*, adequacy of reserves and propriety of investments. Gradually the industry has swung the state regulators towards the notion that the best way to guarantee safety

is to prevent rate cutting. This idea gets its start in legitimate co-operative "risk-rating" bureaus where the companies pool information on losses. Soon the collective risk-rating turns into collective premium setting, despite the fact that the loss experience of different companies varies widely in accordance with their selection of risks and the greater success of some companies in making profitable investments and trimming selling costs. State insurance regulation ranges from excellent to mere formal control carried out by incompetent political hacks with inadequate staffs. There is a place both for state regulation of solvency and federal requirement of competition; one is not a substitute for the other.

Another field in which great power over federal commerce has been turned over to state regulation is petroleum. Here there is no explicit exemption from the antitrust laws; but a system of price maintenance by state officials has been preserved by periodically renewing Congressional approval of an Interstate Compact on Oil. Under the authority so granted the few oil producing states coordinate their oil production so as to control the price that the rest of the country must pay. This arrangement, like other exemptions, traces back to exigencies of the Great Depression and wears the protective coloration of a "conservation" measure. The fact of the matter is, however, that state regulation of production long ago detached itself from engineering considerations and proceeds primarily on the basis of realizing a profitable price for most producers. The Texas Railroad Commission has not even troubled to disguise its true role as price-maker for domestic and even imported petroleum, but calls to account integrated oil companies that dare to import crude petroleum, with the implied threat that continued importation will lead to cuts in allowable domestic production. Thus the foreign commerce of the United States in a strategic material is governed by local officials, who in turn cannot help becoming the spokesmen for dominant industry groups.

The oil industry also furnishes the most remarkable illustration of a tendency toward exemption from the antitrust law by action of the executive branch of the federal government. The tendency to give more discretion to the executive department manifests itself in the proposal of the Majority to expand the consent decree practice and in the recommendation of legislation authorizing the President to grant exemptions in pursuance of national defense objectives. But

the most striking recent exercise of executive discretion to dispense with competition was in the case of the Iranian Oil Cartel, where, without legislative authority, five leading American companies were permitted to join with dominant foreign interests in the greatest international oil cartel the world has seen. Its membership comprises the producers of not less than 87% of the free world's oil. In essence, what occurred was this. The Iranian government decided to nationalize the properties of Anglo-Iranian Oil Co., a British enterprise holding an exclusive franchise in Iran. There was disagreement over the amount to be paid and other terms. Western governments and oil companies having concessions in other Middle-East countries supported the British. An impasse led to shut-down of Iranian production and an economic and political crisis in Iran. Iranian public feeling made it necessary that the hated British monopoly be at least partially displaced. The new international cartel was the answer. Perhaps it was the right answer, from the military-diplomatic point of view, despite some indications that we may have succeeded in diverting a portion of Iranian ill-will from the British to ourselves, and despite rumblings of protest already heard in Europe against the economic consequences of the Near-East oil cartel.[15] But objections to the plan from the standpoint of American antitrust policy are formidable. Here were huge enterprises already established on various concessions in the Middle East with more than adequate reserves of oil. Some of them had already been officially accused of conspiring to maintain an artificially high price for this cheap Middle Eastern petroleum. The Wall Street Journal reported the open secret that one of their main concerns in entering this pool was to see to it that Iranian production *should not return to the world market too rapidly* so as to hurt the world price. Only the antitrust laws stood in the way. This obstacle was surmounted by an extraordinary dispensation granted by the executive department, without sanction of any statute of Congress.[16] Moreover this executive exemption contained no conditions designed to safeguard the public interest or the interest of American oil refiners who must buy foreign crude. When the American Five and their European

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[15] New York Times, March 18, 1955, p. 41: *U. N. Unit Attacks Europe Oil Prices.*

[16] In its daring invocation of the President's defense powers to transcend legislative authorization it is comparable to the seizure of the steel plants in 1952.

partners meet to discuss Iranian production policy they must inevitably take into account their production and sales from other concessions and even at home. Discussion of production becomes in the end discussion of the market and of price. No representative of the American public sits in on these discussions. There is no guarantee of any sort that this private cartel coordinating production of the world's cheapest oil will give the public the benefits of its low cost.

The history of executive intervention in antitrust policy is not reassuring, whether we look at President Theodore Roosevelt's approval of some early U. S. Steel expansionism, or at executive disposition of surplus steel and rubber plants to dominant firms since World War II, or at the concentration of defense orders in the largest companies, or at the exercise of Presidential prerogative in controlling competition in international aviation. Executive decisions are generally and often necessarily made in comparative secrecy without detailed supporting explanation. These references to the dangers should not be taken as an argument for disabling the executive completely in this area. All that is suggested is that *Congress* define the exemption power, and place as much of the fact-finding and decision-making as possible in the normal deliberative tribunals. Executive intervention should be limited to a veto or modification on defense grounds, based on a finding that the defense objective cannot feasibly be achieved except by exemption from the normal requirements of the antitrust laws.

Finally, I must record my reservations as to the Majority's disposition of the "primary jurisdiction" controversy. In particular, the Report ought to disapprove the judicially created exemption for anticompetitive behavior in regulated industries where the parties engage in it without any attempt to comply with the statutory requirements for exemption. The mere fact that the regulatory agency *might* authorize the behavior should not be a defense to an antitrust proceeding. Furthermore, it should be clearly recognized that abuse of administrative procedure to obstruct a competitor's activities may itself amount to a violation of the Sherman Act even though the agency does have "primary jurisdiction." It would be hard to devise a more effective scheme for destroying a competitor than by wearing him down in protracted and repeated administrative challenges of his right to do business.

FOREIGN COMMERCE

I join in the dissent of Eugene Rostow on the failure to recommend efforts at the international level to reduce monopolistic practices in world commerce, and record my doubt that experience under the Webb-Pomerene Act justifies its continued availability at least for the exporting giants who have made the most of it.

A PROPOSAL FOR LEGISLATIVE INVESTIGATION AND TO CREATE A FEDERAL FREE ENTERPRISE COMMISSION

A number of specific legislative proposals have been advanced in the preceding pages. But it may be that the most important consequence that could flow from this Committee's work would be the launching of a major legislative investigation of the state of competitive enterprise in this country. The investigation should undertake to do the fact-finding that the Committee declared itself unable to do. If, upon investigation, it is found that a situation has grown up under present law that is inimical to the best interests of the country, appropriate remedies could be proposed.

Among the courses that might commend themselves for consideration would be the establishment of a Federal Free Enterprise Commission, an independent permanent agency to combat monopolistic tendencies in our economy. The organization and powers of this agency might be patterned generally on those of the Securities and Exchange Commission under the Public Utility Holding Company Act. Its jurisdiction should be limited to firms having a specified high degree of control in the national market or in major regions of the country. Antimonopoly functions of the Federal Trade Commission would be transferred to this new agency, leaving the hard-pressed Federal Trade Commission free to handle the essentially unrelated job of policing fraudulent advertising and other improper business practices. The Free Enterprise Commission would investigate antitrust violations and report them to the Department of Justice, which would retain control of litigation before the courts. The following might be designed as powers and responsibilities of the new agency:

(1) Power by regulation to define and prohibit anticompetitive practices.

(2) Power by regulation or order to prevent integration not justified by production or distribution economies, and to require advance approval for certain classes of such transactions.

(3) Power to compel the reorganization of excessively large enterprises into units conforming with the standard of paragraph (2).

(4) Power to make exemptions under standards defined by statute.

(5) Authority to appear before any government agency, including Congressional Committees, to present testimony or argument as to the implications for free enterprise of the matter before the agency.

(6) A duty to report annually on the state of free enterprise in the country and to propose legislation for the further protection of free enterprise.

(7) Responsibility to report to Congress on internal trade barriers erected by the states, and authority to cooperate with the states in eliminating such trade barriers by providing economic studies, etc.

Among the advantages which might accrue from the creation of the proposed Free Enterprise Commission would be:

(1) Opportunity for continuous study and progressive development of policy in place of the intermittent ad hoc efforts of Congressional Committees and other specially assembled groups.

(2) Some relief for the courts from the burden of conducting the protracted economic investigations which are the substance of the great antitrust cases.

(3) Elimination of overlapping jurisdictions, duplication of investigation, and policy inconsistency of the Antitrust Division and the Federal Trade Commission.

(4) More rational selection of sanctions, *e.g.*, use of criminal proceedings for deliberate price fixing agreements rather than the relatively innocuous cease and desist order, as sometimes happens at present merely because the Federal Trade Commission first took jurisdiction of a case.

(5) Improved administrative policing of decrees and orders.

GENERAL COMMENT ON THE SCHWARTZ DISSENT

by

M. A. Adelman
Professor of Economics
Massachusetts Institute of Technology

THIS COMMENT is limited largely to economic analysis and policy. It cannot serve as a "rebuttal" because I am far from being in complete disagreement with Mr. Schwartz. Long before his document appeared, various members (occasionally including myself) were already on record on almost every specific point he raises. Whether these are "major aspects" or not, there seems no objective way of knowing. I do, however, disagree with the position, apparently shared by Messrs. Adams, Kahn, Rostow, and Stigler, that the Report is ineffective or wrongly effective in the area of Bigness and on the whole recommends regression rather than advance. But even here we have some occasion for doubt. Two years ago, Mr. Kahn co-authored an appreciation of Big Business[1] which, whatever its virtues or defects, was utterly irreconcilable with Mr. Schwartz' basic position. Either Mr. Kahn has experienced a shattering transformation of his opinions, or else it is not accurate to include him as joining Mr. Schwartz on the major point.

Furthermore, Messrs. Adams, Clark, Kahn, Rostow, Stigler and myself, and others, were able to agree[2] on one aspect of the problem, to this effect:

> Studies have been made of the trend of monopoly over the past 50-odd years. Despite the severe technical limitations of the data, it is significant that they lend no support to the idea that monopoly has increased. In manufacturing, the largest and most important segment of the antitrust area, several comparisons have been made of the degree of concentration in the largest corporations over different periods of time. It is striking that the result of these studies is always the same; a slight decrease, if anything, in the degree of concentration, and certainly no increase since the turn of the century. There is no factual basis for a widespread impression that over-all concentration increased during World War II, or was increased by a merger

[1] Kaplan and Kahn, "Big Business in a Competitive Society," special supplement to *Fortune*, February 1953. The publisher may still be able to furnish separate copies.

[2] Mr. Schwartz to the contrary notwithstanding: see footnote 3 below.

> movement during 1940-47, although there were significant increases in concentration in several important industries. There is probably more competition in wholesale and retail trade than in 1900. In general, we no longer have industries dominated by single large firms, as we often did then; nor isolated local markets dominated by local monopolists. Alternatives to the consumer, whether families or business firms, have increased and not decreased. The progress of science and technology, the decline in transportation costs, and the development of new forms of production and distribution, have been both result and cause of competition, and the antitrust laws have provided them with a favoring climate.

Now, unlike Mr. Kahn's earlier article, this position is *not* incompatible with the view that much more ought to be done about (or to) bigness. For one can with entire consistency maintain that (1) concentration is not on the increase, but (2) there is far too much of it right now. But certainly much of Mr. Schwartz' sense of urgency rests on a belief that concentration and monopoly are on the increase —his reference to "the merger movement" without any time limitation, and the need to "roll back the tide of monopoly" are meaningless otherwise. And here he has no support from his fellows.

"Antitrust Goals." We may pause briefly with the "political liberty," allegedly menaced by "economic power . . . in relatively few hands." I do not know what "power" means in this context, but the distribution of *income* has tended to become rather more equal over the past 40-odd years. The farmers, not big business, have been mobilized in production-marketing cartels who levy tribute on the rest of us. A Supreme Court decision unfavorable to much of big business—*Cement*—has never been superseded by a new law, but when "fair trade" was invalidated in 1951, it was re-enacted stronger than ever within a year. At present, a reciprocal trade bill which is mild, badly needed to strengthen our foreign relations, and actually beneficial to ourselves, is being delayed and perhaps destroyed, largely though not wholly by small-business pressure. And so on. It is too bad that Mr. Schwartz is still pre-occupied with outworn legends about the political power of big business.

The Contribution of Economics. In place of a digest of facts, "the Report offers a survey of economic theory * * * " (p. 2). It does not. (A comparison of its table of contents with that of any textbook will suffice.) Section 7 explains its purpose as offering a few tools

which may be useful in the analysis of situations occurring frequently in antitrust litigation. Perhaps the tools aren't very good and will be of little help in concrete cases. But as will be seen, it is *the felt need for analysis* which Mr. Schwartz simply does not share, and this explains his misunderstanding.

But Mr. Schwartz is strong for some kind of economic inquiry. It is in interesting contrast to his earlier opinion on "the cacaphony of experts" who cannot agree on anything of any importance, particularly trends in concentration.[3] Mr. Schwartz now implies that there exists quite a body of settled knowledge which we have wrongly neglected: the TNEC investigation, Congressional committee reports, Federal Trade Commission studies, etc., "are substantially ignored." Yet could it be that this body of literature was known all too well?

Thus at page 5, we are offered "the big-two, big-three pattern * * * Economists tell us that when the number of sellers in a market is reduced to two or three, they operate much like a monopoly. * * * " Perhaps some economists do so "tell us"; we need not press the point because in most of the eleven industries which Mr. Schwartz mentions, we have no reduction to "two or three" sellers, as a glance at the Celler Committee's concentration ratio statistics will reveal.[4] In any case, these are eleven industries out of about 450. What does it mean to list them?

> "We know [sic!] from a study by the FTC that the merger movement long ago passed the point where integration necessarily promotes efficiency, for the study showed that medium or small operations were generally the most efficient."

It is so unhappily true that one light-hearted sentence takes several pedestrian paragraphs to refute. What is "the merger movement" to which Mr. Schwartz refers again and again? If he means that mergers are always going on, this is obviously true and just as obviously trivial. If, however, he refers to mergers which increase the degree of concentration in the economy, then there is no such thing as "the merger movement." There was a great merger move-

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[3] Schwartz, "Legal Restriction of Competition in the Regulated Industries," 67 *Harv. L. Rev.* 436, 472 (1954).

[4] Letter, Secretary of Commerce to Honorable Emanuel Celler, Chairman Subcommittee on Study of Monopoly Power, H. R., December 1, 1949, Table II enclosed.

ment around 1900, which had a substantial concentrating effect. There was a much less important one in the 1920s. There was a "merger movement" during 1940-47 which existed only in some people's fertile imagination, and if Mr. Schwartz will refer to last February's hearings of the Joint Committee on the Economic Report, he will find people of his general persuasion making no reference whatever to the 1940-47 "movement." There is (probably) a real, not a fictitious merger movement going on right now, and it may yet be as important as the one in the 1920s, although personally I doubt it. There is no slightest chance whatsoever that it will have even the mildest resemblance to the one around 1900.

Now for this FTC study, which was TNEC Monograph No. 13. The cost studies there have nothing to do with any merger movement. They have nothing to do with the degree of integration. Even a cursory reading of the table of contents reveals this much. Furthermore the actual findings of this study, not the misleading summaries which have duped Mr. Schwartz, indicate that large plants and firms are more efficient than small. (This conclusion seems to me so inadequately supported in the Monograph, however, that I would pay it no attention.)

Suppose that we were to array all companies in a number of industries from highest cost to lowest cost. If size had no relation to efficiency, then the costs of the largest companies would be around the average for all companies. If size were associated with inefficiency, the costs of the largest firms would mostly fall above the average. If size were associated with greater efficiency, then the costs of large firms should fall well below the average. Even if the relation between size and greater efficiency were very strong, we could not expect the largest firms always to be the very lowest cost, because they are so few in number. In point of fact, the largest firms do much better than average, and the Monograph is reduced to the utter sophistry of arguing that they are less efficient because they are not always the very best. The argument was too much for the stomach of Mr. John M. Blair, whose anti-big-business writings need no introduction from me. It is too bad that Mr. Schwartz did not get around to read his devastating review,[5] or at least to reflect on the logical error in the Monograph.

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[5] See 24 *Rev. of Econ. & Stat.* 125 (1942).

So much for Mr. Schwartz' charge that the Report neglected to do its economic homework. It does not seem necessary to explore it any farther, although there are other statements with which I could take issue.

But in all fairness to the central position of his document, Mr. Schwartz' failure does not mean that the position is wrong. A good cause is not defeated merely because erroneous arguments have been offered on its behalf. And it is important that the opposition to bigness be stated as clearly and impressively as possible. We can ill afford to dispense with the various kinds of insights that flow from diverse points of view. Strong opposition to bigness, when held by people with an interest in facts, will stimulate research and discussion, and reveal facets of the subject which would otherwise be neglected. They will suggest policies on specific matters which may be altogether acceptable to others. The large corporation looks different today from the 1900 model, and it will look still different 50 years hence. A more perfect understanding of the phenomenon is to be sought by encouraging diversity of opinion. But it will not be served by jaunty assurance that the facts are as the convenience of our argument would like them to be.

The Central Position of the Dissent. Beyond some point or other, size should come under a kind of public-utility ordeal—let the big company positively justify its efficiency, or suffer dissolution. I think the costs of such a program would be great and its benefits illusory; but I also think I would have some difficulty in rigorously proving this. So would those who agree with Mr. Schwartz. I am personally content to leave the matter in this rather unsettled state because the question is one that we do not need to reach. The Report quotes Judge Wyzanski:

> "In the antitrust field the Courts have been accorded, by common consent, an authority they have in no other branch of enacted law * * * they would not have been given, or allowed to keep, such authority in the antitrust field and they would not so freely have altered from time to time the interpretation of its substantive provisions, if Courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable

competition, and to those aiming at immediate realization of the social, political and economic advantages of dispersal of power."

No broadside attack on bigness will be considered by Congress or public opinion. But there is plenty of support for a different kind of result. There is always a good chance that large business will find it safest to refrain from trying to get any business advantage over rivals, by way of aggressive price or quality or innovational competition. And the knowledge that all other rivals are on the same kind of notice, and that there is no need to be aggressive lest position and profits be lost gives business a perfect basis for a comfy-cozy live-and-let-live regime, just as the knowledge that all rivals will respect a non-competitive price supplies the basis for avoiding price competition.

But rejection of the attack on size as such is no absolute. So long as there are no inhibitions on pursuit of business advantage, and on growth through retained funds or external financing, it is not inconsistent to support a very stringent rule against growth by merger.

Mergers. In the whole bigness area, the topic of greatest immediate interest is that of mergers under the amended Section 7 of the Clayton Act. Mr. Schwartz is highly merger-conscious. He paraphrases the Report:

> "Any corporation, no matter how big, may swallow up another if it has 'good business reasons' for doing so, e.g., 'to expand,' and if the Government is unable to show that competition has been so restricted that others are 'foreclosed' from a substantial market. This rule is in substance supported by the Majority * * *"

This would be important if it were true. But not only is it contradicted, as he himself indicates, by Section 1 of the Report. It is mightily revealing that nowhere in his dissent will Mr. Schwartz undertake any analysis of Section 3 (the merger section) of the Report; he will not even refer to its existence. He prefers to talk about, of all things, the *U. S. Steel* decision of 1920; Columbia Steel and Transamerica, which we will more conveniently deal with later; and a highly inaccurate account of Pillsbury Mills. When Pillsbury (which is *not* the "leading firm") acquired a competitor, which gave it among other things 45 per cent of one particular sub-market (*not* "the relevant market") this did not constitute a prima facie

case to the Hearing Examiner. The Commission held that it did. They not only gave an accurate account of the statistics, but also pointed out that entry was unlikely; that concentration had been increasing; and that the merging firm had been purchasing competitors. What reader would guess this from Mr. Schwartz' recital? Still less would they suspect that the Report asks for nothing less and something more than the *Pillsbury* doctrine.

When Mr. Schwartz is so interested in mergers, and so studiously avoids the section of the Report which dealt with mergers, one may be forgiven the suspicion that any account of that section would jar painfully with the general picture of the Report which he is trying to build up.[6]

Per Se Rules and Rule of Reason. According to Mr. Schwartz, "one of the major issues" was that he calls "a powerfully supported proposal"—which has a pleasantly sinister sound—"to expand the rule of reason." Despite the powerfully supported proposal, it seems that the Report does not call for any such general expansion; but he is displeased with its general drift. It is puzzling why Mr. Schwartz discusses at length what the Report does not say, and why he does not discuss what the Report does say. Very briefly and baldly it is this. The rule of reason is universal, with no exceptions. Every antitrust case demands an analysis of the relevant market situation. But even the most disinterested kind of economic investigation considers only enough facts to confirm or refute a hypothesis, and in an antitrust case one needs only enough evidence to prove or disprove the existence of a restraint. Anything more is a waste of time. Certain kinds of practices, e.g., price fixing, even standing alone, imply the power to control the market, since without this power reasonable men would not try to fix prices. And that settles the matter. Other industry practices are more difficult to identify as price fixing or not. Still others may have restrictive effects or not, depending on the circumstances.

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[6] Although it is of only incidental interest, strong objection must be registered to the way in which Mr. Schwartz persistently imputes to the Report positions the contrary of what it has taken. His long discussion of the *Timken* case stresses the futility of requiring intra corporate "competition." The suggestion is adroitly conveyed that the Report favors this. In point of fact, the Report at p. 36 recognizes its futility, and calls for dissolution. The same kind of misleading reference is to the *duPont* case at p. 7. The District Court, rightly or wrongly, found that the "obvious power" did not exist, not that if unexercised it was proper. Still less does the Report say any such thing. In fact it lays emphasis throughout on monopoly power being the economic content of the offense.

Hence Mr. Schwartz' statement that the rule of reason "makes relevant the entire history of the industry, all evidence bearing on the good and bad purposes and consequences of the restraint," etc., is incorrect, and beside the point. In *any* kind of case "inquiry should stop when the restraint has been identified." The question is, when have we identified the restraint? Mr. Schwartz is attempting to persuade us that the rule of reason, or the Majority's version of it, embraces some kind of lengthy exculpatory proceedings. There is nothing at all in this.

Now we can better appraise the suggestion "that certain practices should be illegal per se when engaged in by companies dominant in their fields." If "dominant" means simply large size, then Mr. Schwartz ought to say so. If "dominant" means simply large size, then Mr. Schwartz ought to say so. If "dominant" means possessing certain power, then the only way to find the existence or non-existence of power is by analyzing the market to see whether any such power exists. The idea that dominance is an obvious easily identifiable trait, like the belief in Santa Claus, is nice if you can retain it through the vicissitudes of adult life.

Let us now draw the threads together to demonstrate, by using Mr. Schwartz' own examples, that his suggestions would mean not more but less antitrust enforcement:

Columbia Steel. Mr. Schwartz has nothing to say about the market situation as affected by this merger, except for rhetoric about "the great steel trust." His objection is nothing more than this: that the acquisition would mean exclusive dealing as between acquiring and acquired firms. Of course this is correct of every single vertical merger.

And this was precisely the ground upon which the case was argued. The Government did have at its disposal a competent economic presentation; but this was largely disregarded because they had the rule of law Mr. Schwartz wants: *U. S.* v. *Yellow Cab Co.* The evidence was nothing, the decisional gimmick was everything: vertical integration was illegal per se.

Of course this sort of thing can get by the courts—once. The second attempt met the fate it deserved.

Transamerica. Here the Board made a finding that the relevant market was local. And then they provided not a single finding that any local market was in any way affected. The Third Circuit was quite as aware of the percentages as Mr. Schwartz, and went out

of their way to suggest that something be done about them. But as conscientious judges, they had to decide on the record, and the record simply had no basis on which they could act.

And why did the Board let it go up in so defective a state? Because they too needed no facts; they had their decision ruling mergers illegal *per se*—in this case *Standard Oil Co. of California* v. *U. S.* This was logical enough: if requirements contracts covering a small part of the market were illegel *per se*, then *a fortiori* any merger visible to the naked eye must also be illegal *per se*. And again the courts threw it out.

The urge for *per se* rules in such cases is much like the desire to abolish friction in order to proceed more freely. It is not required by even the most uncompromising opposition to size. It produces a few empty legal victories—Dead Sea fruit. It is simply a nuisance and a distraction to any reasoned discussion or any useful body of law, and so long as we waste time on it we will have no excuse for lack of progress in any direction, whichever one we happen to prefer.

A Note on Robinson-Patman. Perhaps I may be allowed one brief foray off the general topic of bigness. Mr. Schwartz' one case reference illustrates so well the looking-glass quality of the argument: the facts of the case are in mirror-image contradiction to the way Mr. Schwartz has them. There was gross discrimination, all right, but it was against the most efficient customer who received the *lowest* price, since the differential in his favor was well short of the cost saving. This customer was a manufacturer of oil burners who started with nothing and went to the top by drastically cutting the price and omitting the razzle-dazzle and "service" that the public showed it didn't want. His discomfited rivals learned that printing derogatory stories in the trade press only furnished him with free advertising. So the FTC went out to harass his principal supplier. The Report may rescue us from this kind of thing, and if it does not, then a repeal of the Act is in order.

FOREIGN DISTRIBUTION ARRANGEMENTS AND THE SHERMAN ACT*

by

SIGMUND TIMBERG

RECENT COURT DECISIONS have reminded the American businessman engaged in foreign operations that his conduct is subject to seven lines of a law passed by Congress back in 1890. The Sherman Act's application to foreign commerce has entered a new and, to the American exporter, disconcerting phase.

During the first three decades of this century, antitrust treble damage suits brought by private parties gave considerable trouble to shipping lines and to companies charged with monopolizing foreign sources of sisal, bananas and other products destined for importation into the United States, but the American foreign trade community generally was not affected. Government actions in the foreign field were extremely few; the domestic enforcement of the Sherman Act was so overshadowed that, for example, very few people realized the famous *Tobacco Trust* case of 1911 involved illegal cartel arrangements with British tobacco companies.

Even the large number of cartel cases launched by the Government just prior to and during World War II aroused little lasting concern among the rank and file of American exporters and importers. Those who looked into the matter by and large recognized that the Government was proceeding, in these cartel cases, against clear-cut agreements of business firms not to compete and against over-enthusiastic efforts to make the patent system do a job for which it was not intended—the regulation of foreign commerce.

NEW FEELING ARISES

In the last half-dozen years, however, an entirely new feeling of doubt and frustration has hit the export community. A few random comments by judges, in recent cases involving the tapered roller bearings, coated abrasives and nylon industries, have given rise to the fear that even the most customary and seemingly innocent activities in foreign trade may lead American exporters into antitrust

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grief. American business interests have become uncertain as to the extent to which they can validly use the ordinary mechanisms of foreign trade and production, such as their foreign patent rights, foreign corporate manufacturing subsidiaries and foreign distributors. Many of these fears and uncertainties are, in my view, exaggerated, but no one can question the current need for careful review and appraisal of the legal consequences of many foreign business operations that had hitherto been taken for granted.

SHERMAN ACT

I intend to deal here primarily with the problem of the foreign distributor. But to deal realistically with this problem it is necessary to go back to its source—the interpretation of the Sherman Act.

I will be brief about Section 2 of the Sherman Act, because most exporters probably operate on too small a scale within their respective markets to be in danger of its violation. This section provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *" Two things, should be noted about this provision:

First, it can catch the business minnow as well as the corporate whale. The Department of Justice has taken some microscopic views as to the size of the market that constitutes a "part of the trade or commerce * * * with foreign nations * * *" As I interpret the Antitrust Division's recent complaints against four companies engaged in the perfume and cosmetics industry, whatever is covered by a single trade-mark of an American company is broad enough to be "a part of the trade or commerce * * * with foreign nations," and hence a proper object of the Division's concern.

Second, the Government (or a private treble damage plaintiff) doesn't have to prove that a violator of this criminal statute had a specific intent to "monopolize" or to "combine or conspire to monopolize." A charge of "attempt to monopolize" does require proof of "specific intent," but many an antitrust defendant has been surprised to learn how quick the courts are to infer such an intent from his routine, automatic business operations.

NO FIRM IMMUNE

No firm doing any substantial foreign business is immune from the snares and pitfalls of the following three lines of Section 1 of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *" This section furnishes a general weathervane indication of legal business behavior, but it does not put the exporter on any strictly defined legal routes. Let me set forth three main travel instructions for the law-abiding businessman, but always with the caveat that his specific route may be subject to hazardous forks and unexpected and dangerous detours:

First, the words of the statute forbid "every" restraint of trade; the courts, however, say that it forbids only "unreasonable" restraints of trade. But an agreement among competitors, actual or potential, to allocate, share or divide markets is always unreasonable. It doesn't matter whether the markets are defined geographically—I take the British Empire as my sales area, you take South America; or industrially—I'll take over all foreign sales of cellulose for explosive purposes, you take over the photographic film market; or functionally —I'll take care of certain classes of customers, you handle the others.

The courts consider such a direct elimination of competition to be about as serious a restraint of trade as one can have, and therefore to be automatically "unreasonable." The same applies to price-fixing agreements among competitors, although their occurrence in international trade is less frequent.

Second, having pointed out that the first word of Section 1 does not mean what it says, let's pass on to the second word. Since the statute prohibits every "contract" in restraint of trade, one can frequently say, for example, that an exclusive distributorship contract under which a rival manufacturer takes over your sales in the British Empire is a thinly disguised allocation of territories, and is therefore presumptively bad.

But the obverse does not follow—one can never be quite sure about a seemingly innocent contract. Section 1 makes illegal any "conspiracy" as well as any "contract." Economic "conspiracies" in the antitrust field frequently contain many innocent (and sometimes even wholesome) features, and yet the underlying motives and

the general behavior patterns of the businessmen involved may support the conclusion that they have restrained the foreign trade of the United States. So never feel safe about the antitrust propriety of a particular agreement, practice, act or condition until you have fully taken into account all surrounding economically relevant agreements, practices, acts and conditions.

Third, an agreement, or act, or plan or program does not violate the Sherman Act unless it "restrains," or seeks to restrain, the domestic or foreign commerce of the United States. This is, in a sense, more of a protection to the American exporter than the requirement that an illegal restraint must be an unreasonable one, for it constitutes a jurisdictional barrier against the exporter's being sued on activities or agreements which have no impact on domestic or foreign commerce of the United States. Thus, a purely internal price-fixing arrangement in France, if it clearly has no effect on United States imports or exports, will not violate the Sherman Act.

Thus, a United States firm engaged in foreign trade has two main protections against being involved in Sherman Act violations—a jurisdictional protection against being prosecuted for acts which do not affect the commerce of the United States, and a substantive protection against being sued where the restraint is a reasonable one. However, "reasonable" means reasonable in the light of a law whose main objective is to avoid restraints of competition.

ANTITRUST CHARGES

The foregoing are not easy standards to apply. Business executives tend to rely on their own subjective notions of proper territorial limitations on the jurisdiction of American courts, and their own personal concepts of what is unreasonable under the circumstances. They then discover to their dismay that Government authorities and courts have either more ambitious or more puritanical ideas. Charges of antitrust violation can be made despite:

(1) *The antiquity of, and long acquiescence in, a practice or agreement.* Thus the recent dramatic complaint against the United Fruit Company went back to the beginning of the century for its basic charges. A proceeding launched about a year ago against the American Smelting and Refining Company involves agreements

entered into in 1922 and 1923, as well as later agreements of 1929 and 1938.

(2) *The fact that the people who are legally regarded as conspiring among themselves hold themselves out as a single business entity.* Thus in the bearings industry the Justice Department brought suits against a United States company and its partially-owned British and French subsidiaries (the *Timken* case); a Swedish company and its 97 percent-owned U.S. subsidiary (the *SKF* case); and the 50 percent-owned U.S. subsidiary of a British company (the *Norma-Hoffman* case).

(3) *The small amount, relatively or absolutely, of the foreign commerce involved.* This is most readily demonstrated in the foreign field by the Justice Department cases, already referred to, against concerns in the perfume and toilet goods industry. Certainly Guerlain and Empro occupy individually only a small fraction of the United States perfume market, and an even more minute portion of the two-billion-dollar domestic cosmetics and toilet goods industry. The Antitrust Division apparently regarded each trade-marked variety of perfume as a separate market, capable of being illegally restrained and monopolized.

(4) *The extraterritorial nature of the activities involved.* Recent cases, such as the *National Lead, Minnesota Mining* and *duPont-ICI* cases, have merely underscored the fact that the Government can, in antitrust cases, attack the acquisition of foreign properties, or contracts executed abroad or relating to foreign property rights. Even in the 1920s it was clear from the *Norddeutscher Lloyd* and *Sisal Sales* cases that American courts could exercise jurisdiction over activities most of which took place in foreign countries, provided such activities had an adverse effect on competitive conditions in U.S. domestic, import or export markets.

(5) *The tolerant attitude of foreign governments towards business restrictions, and the psychological pressures of foreign companies.* Companies doing a foreign business are frequently confronted by suggestions from foreign governments that they do things which may involve them in antitrust difficulties. For example, they may be invited to agree upon a quota among themselves for imports into a foreign country. Their business competitors in the foreign country

may expect them to go along with various quota limitations or price-fixing arrangements.

PAUCITY OF LEGAL EXCUSES

Companies facing such suggestions and pressures should bear in mind that only a direct requirement by the foreign government that they engage in a trade-restraining activity can be advanced by them as a legal excuse for doing so. Moreover, the recently launched complaint against the Swiss watch industry suggests that the Department of Justice may not accept even this excuse when the foreign legislation affects our own industry and trade and undercuts the Sherman Act.

Brevity, and the fact that incomplete and not properly qualified advice is frequently misleading advice, permit only a few additional words of specific warning on the ticklish question of foreign distributorships. There are no litigated cases which clearly indicate what is legally right or wrong, but the Justice Department's prior course of action suggests that some difficulties may be avoided by the following precautions:

FOREIGN DISTRIBUTORSHIPS

First, don't use a rival manufacturer—who is, after all, an actual or potential competitor—as your distributor, sales representative or agent in a foreign market. The presumption is that this stultifies you from waging effective competition in the foreign market. Furthermore, this practice is felt to create a situation where the independent, non-affiliated U.S. manufacturer or exporter is competing abroad against the combined strength of the U.S.- and cartel-affiliated foreign distributor.

Second, unless you clearly qualify under the Webb-Pomerene exemption, make every effort to avoid having a common distributor with a rival, and therefore possibly competing, manufacturer. Lawyers are fond of saying that no man can serve two masters, and the Government antitrust lawyer has brought many cases on the assumption that such common distributors keep the U.S. firm from building up sales organization and goodwill for its products abroad, and are devices intended to guarantee the American firm's not

competing in foreign markets. Incidentally, it is the view of many foreign trade experts that a firm's business interests will be better served by having a foreign sales organization loyal to it alone.

Third—and this may be a counsel of super-caution to companies with a dominant share of the export market in a commodity—canvass carefully your need for exclusive distributorships in foreign markets. Try, if commercially feasible, to give the independent American exporter a break in foreign markets.

Fourth, big or small, enter into no distributorship or other arrangements which impose a ban on re-exports from foreign countries into the United States.

Fifth, don't assume that the specific rules which govern trade within the United States also apply to export trade. The facts, the problems and, therefore, the applicable legal rules may be quite different. For example, your friends in the oil industry have gotten into antitrust trouble because they insisted on having exclusive distributors in the United States who would not sell the products of competing oil companies. This does not necessarily mean that you are safe in selling products abroad (or even in this country) through common distributors with competing manufacturers.

Within this country, the main antitrust objective is usually to make it possible for new or small firms to enter a market and to compete, and the presumption is that exclusive distributorships in the hands of established companies make such entry and competition difficult. In foreign trade, the overriding antitrust objective is usually to make sure that there is no illegal division of world markets, and a system of common distributors is thought to promote such division. Hence, what is sauce for the American goose is not necessarily sauce for the European gander.

ACTIVITIES

THE PRACTISING LAW INSTITUTE, 20 Vesey St., New York 7, N. Y. has announced its Spring 1955 evening program devoted to HANDLING TRADE REGULATION PROBLEMS and will be conducted on six successive evenings from 7 to 9 beginning April 13, 1955. The program will present an analysis of the problems arising in connection with federal regulation of merchandising, price fixing and other aspects of business competition. Its purpose is to help chart a safe course in the achievement of the attorneys' clients or his company's policies and objectives. Jerrold G. Van Cise will serve as chairman and will be supported by a distinguished panel of experts.

The Society of Business Advisory Professions, Inc. of New York City (New York University, Vanderbilt Hall, Washington Sq. So.) will hold its Twenty-Second Conference entitled "Centers of Controversy in the Report of the Attorney General's Committee." The conference will be held on the evening of April 27.

The antitrust bulletin welcomes the opportunity of being advised of all antitrust activities. All announcements should be submitted to the editor at least 45 days prior to the date of any meeting or activity.

BOOK REVIEWS

DEWHURST AND ASSOCIATES, AMERICA'S NEEDS AND RESOURCES: A NEW SURVEY (Twentieth Century Fund: New York) 1955. Pp. 1148, illus. $10.00.

In a large and well-illustrated volume, the Twentieth Century Fund presents the results of a survey of America's potentialities. The conclusions are positive. Among the major predictions are that total national output will be $414 billion in 1960 and that that figure will continue to rise. Also, by 1960 our population should be 177 million, with 69 million at work or in the armed forces. As a long-range prediction, average output per hour of work is so steadily on the increase that in another century a worker may produce today's equivalent of a 40-hour work week in one seven-hour day. The result of five years of research by Dr. J. Frederic Dewhurst, Executive Director of the Twentieth Century Fund, and a staff of 25 specialists, the book is a completely revised version of an earlier survey published in 1947. Even a cursory reading should do much to reassure the business community that investment in America's future is safe and profitable.

BIBLIOGRAPHIA

COMPILATION OF A comprehensive bibliography of current antitrust literature is difficult, and it is made more so because present-day interest in the subject has led many publications otherwise unconcerned with the law, the lawyer, economics and the economist to seek out and publish material on mergers and fair trade, to mention two of the more popular topics. Yet a comprehensive bibliography in a legal periodical should include even "popular" treatments of the law, so that the attorney will know what public opinion is and how it may affect his client's interests.

In this first issue of the ANTITRUST BULLETIN we have only listed various articles, comments and books dealing with our field; in subsequent issues we hope to add brief summaries of each of the items that will be listed. There being some 3,000 periodicals regularly published in this country—exclusive of the many newspapers and over 5,000 house magazines—full coverage in our BIBLIOGRAPHIA will require assistance from our readers, in addition to our own efforts among the "dusty tomes and mouldering papers." We shall appreciate notes from our subscribers and other interested sources pointing out articles in foreign journals, trade and industrial magazines, and what outsiders might term the more "obscure" periodicals. Such assistance will not only benefit the BULLETIN, but will in addition be a service to the entire profession.

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